ATTORNEYS' FEES FOR PROPERTY LOSS OR DAMAGE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

SECOND SESSION

ON

H.R. 9681, H.R. 9072, H.R. 17367, H.R. 8138, H.R. 8609, H.R. 14017, and S. 1653

BILLS TO AMEND THE INTERSTATE COMMERCE ACT, WITH RESPECT TO RECOVERY OF A REASONABLE ATTORNEY'S FEE IN CASE OF SUCCESSFUL MAINTENANCE OF AN ACTION FOR RECOVERY OF DAMAGES SUSTAINED IN TRANSPORTATION OF PROPERTY

SEPTEMBER 29 AND 30, 1970

Serial No. 91-96

Printed for the use of the Committee on Interstate and Foreign Commerce

U.S. GOVERNMENT PRINTING OFFICE

55-915 WASHINGTON : 1971

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ATTORNEYS' FEES FOR PROPERTY LOSS OR DAMAGE

TUESDAY, SEPTEMBER 29, 1970

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John D. Dingell presiding. (Hon. Samuel N. Friedel, chairman.)

Mr. DINGELL. The subcommittee will come to order.

This morning we are commencing hearings on H.R. 9681 and related bills which would amend the Interstate Commerce Act to permit recovery of a reasonable attorney's fee in cases of successful suit for recovery of damages sustained in the transportation of property. Shippers, particularly small shippers and occasional shippers, sometimes are unable to collect damages to their shipments because the pursuance of a claim in terms of costs and attorneys' fees may well be greater than the amount of the claim itself. Therefore, they want to add attorneys' fees to their court awards where successful.

The carriers, on the other hand, take the position that their present practices of settling claims is equitable. Our correspondence from the Interstate Commerce Commission states that 91 percent of claims reported by regulated motor carriers in 1966 were settled in 90 days or less.

The subcommittee will give this matter its careful attention.

(The text of H.R. 9681, H.R. 9072, H.R. 8138, H.R. 8609, H.R. 14017, H.R. 17367, and S. 1653, and departmental reports thereon follow:)

[H.R. 9681, 91st Cong., 1st sess., introduced by Mr. Friedel (by request) on March 31, 1969;
H.R. 9072, 91st Cong., 1st sess., introduced by Mr. Rogers of Florida (by request) on March 17, 1969;
H.R. 8138, 91st Cong., 1st sess., introduced by Mr. Annunzio on March 4, 1969;
H.R. 8609, 91st Cong., 1st sess., introduced by Mr. Foley on March 11, 1969; and
H.R. 14017, 91st Cong., 1st sess., introduced by Mr. Tiernan on September 25, 1969,
are identical as follows:]

A BILL To amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, **That paragraph 11 of section 20 of the Interstate Commerce Act (49 U.S.C., sec. 20, par. 11) is amended by inserting at the end of the fifth proviso and immediately before the sixth proviso the following: "*And provided further,* That if the plaintiff shall finally prevail in any action, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit:".**

[H.R. 17367, 91st Cong., 2d sess., introduced by Mr. Jarman on April 30, 1970, and S. 1653, 91st Cong., 2d sess., referred to the Committee on Interstate and Foreign Commerce on January 27, 1970, are identical as follows:]

A BILL To amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph 11 of section 20 of the Interstate Commerce Act (49 U.S.C., sec. 20, par. 11) is amended by inserting at the end of the fifth proviso and immediately before the sixth proviso the following: "*And provided further*, That the court, in its discretion, may allow a reasonable attorney's fee to the plaintiff in any successful action, to be taxed and collected as part of the suit, but no such fees shall be allowed to the plaintiff except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and that such claim has not been paid within ninety days after receipt of the claim by the carrier or its agent:".

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., June 10, 1969.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.

DEAR MR. CHAIRMAN: Your letter of March 7, 1969, requested the views of the Department of Agriculture with respect to H.R. 8138. This bill would amend paragraph 11 of section 20 of the Interstate Commerce Act (49 U.S.C., sec. 20, par. 11) by inserting at the end of the fifth proviso and immediately before the sixth proviso the following: "And provided further, that if the plaintiff shall finally prevail in any action, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit."

The Department recommends enactment of this bill.

The benefits of this bill to agricultural shippers, particularly those involved in the movement of grain and perishable freight, would be twofold:

It would permit grain and fresh fruit and vegetable shippers to seek redress through the courts of the losses sustained in the transportation of property. This avenue of relief is effectively barred in many instances because reasonable attorney's fees may not be recovered by successful plaintiffs at the present time and such fees very often equal or exceed the amount of an individual shipper's claim.

It would provide an incentive for the carriers to improve their services in the handling of fresh fruit and vegetable shipments.

Prior to June 1964, there was an understanding between most railroads in the United States and the fresh fruit and vegetable shippers, guaranteeing the arrival time of cars at the principal destination markets east of Buffalo, New York. Based upon this understanding, producers and shippers of fresh fruit and vegetables could schedule their shipments for these markets so as to have them arrive in time to permit the efficient and orderly marketing of their commodities. If a car arrived at one of these markets later than the scheduled arrival time, and as a result of this late arrival the shipper suffered a loss of market, the carriers would honor a shipper claim for this loss.

Since June 1964, the eastern carriers which serve these principal destination markets have been denying liability on loss-of-market claims. In denying liability, the carriers rely upon the language in the bill of lading which states in part: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch."

Orderly marketing of perishable food commodities requires a dependable schedule of deliveries to market. Allowing a successful plaintiff to recover reasonable attorney's fees would furnish an incentive for the railroads to improve service and to achieve more dependable delivery schedules.

Grain shippers in recent years also have encountered a serious claim problem with the carriers. Since 1966, the carriers have refused to honor loss-in-transit claims on grain when transported in covered hopper cars—even in those cases

where official weights have been obtained at both origin and destination. Prior to 1966, most carriers honored such claims.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

J. PHIL CAMPBELL, *Acting Secretary.*

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., July 18, 1969.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in reply to your request for the views of the Bureau of the Budget on H.R. 8138, a bill: "To amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property."

The Department of Transportation, in its report to you on this bill, suggests the need to amend this bill in order to prevent abuse of the relief provided by this bill. We concur with the Department's position. We would have no objection to enactment of H.R. 8138 if it were amended along the lines suggested by the Department of Transportation.

Sincerely yours,

WILFRED H. ROMMEL,
Assistant Director for Legislative Reference.

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., August 14, 1969.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR CHAIRMAN STAGGERS: This replies to your requests for the views of the Interstate Commerce Commission on H.R. 8138, H.R. 9072, and H.R. 9681. These three bills amend section 20(11) of the Interstate Commerce Act so as to permit the recovery of a reasonable attorney's fee as a part of a successful action by a shipper for recovery of damages sustained in the transportation of property.

Section 20(11) of the Act relates to the liability of railroads and other carriers subject to part I of the Act for the loss, damage or injury to property resulting from the act or ommission of the carriers involved. By sections 219 and 413 of the Act, the provisions of section 20(11) are made applicable to motor carriers and freight forwarders, respectively. Since liability for loss and damage to property by water carriers is covered by the Harter Act, 46 U.S.C. 181–196, these carriers are not subject to section 20(11) and would, therefore, not be affected by this legislation.

The Commission has no power to settle loss and damage claims between shippers and carriers; thus, in the absence of a voluntary settlement, a shipper's only recourse is a civil action in either a state or federal court. At the present time, no provision in the Interstate Commerce Act permits the recovery of a reasonable attorney's fee by a successful plaintiff in such an action, although in some instances the recovery of a reasonable attorney's fee is permitted by state law. While section 8 of the Act permits the recovery of reasonable attorney's fees in a successful action against a carrier for violations of the Interstate Commerce Act, it has been held that this provision has no application in an action for damages by a shipper under section 20(11) since the Commission has no jurisdiction over the subject matter. *Missouri Pacific Railroad Co.* v. *Harper Bros.*, 201 F. 671 (C.C.A. 7th Cir. 1912). In these circumstances, a shipper having a contested claim is faced with a dilemma, particularly on smaller claims. If he sues on the claim, his recovery in many cases may be less than his attorney's fees. If he chooses not to sue, he may be faced with writing off the uncollected portion of his claim.

Although we have no jurisdiction to settle disputed loss and damage claims, many of these matters are brought to our attention in our day-to-day work in sufficient numbers for us to appreciate the fact that prompt settlement of loss and damage claims is a serious matter to the shipper, particularly in the case of relatively small claims.

Although, as mentioned previously, we have no jurisdiction to adjudicate the settlement of a disputed loss and damage claim, we have developed a number of informal procedures to assist shippers in this area. While these procedures have worked quite well in resolving many disputed claims, there are still many claims which are not resolved and which require recourse to the judicial process. Given the expense of litigation, this remedy is not truly effective particularly in the case of the small or occasional shipper.

For this reason, we support the basic objectives of these bills. Since this legislation applies only to successful actions in court, it will provide the carriers an incentive to settle meritorious claims expeditiously out of court. For the same reason, however, some shippers could abuse the judicial process and harass the carriers with unnecessary litigation over claims which could be easily and fairly settled by the parties involved. In this connection, it appears that the regulated surface transportation industry, as a whole, is settling most disputed loss and damage claims within a reasonable length of time. For example, on the basis of information available to us, it appears that around 91% of the claims reported by regulated motor carriers in 1966 were settled in 90 days or less. Since a judicial action cannot, in most instances, be completed within this time, this suggests that the carriers and shippers have been able to handle most of these claims on a voluntary basis. For these reasons, the Subcommittee may wish to consider the following amendments to H.R. 8138, H.R. 9072, and H.R. 9681.

Insert after "suit" on line 9: No attorney's fees shall be taxable except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and, that such claim has not been paid by the carrier within 90 days of the receipt of the claim by such carrier or carriers.

This amendment would not preclude a shipper from exercising his right to have a disputed claim adjudicated in court in the first instance if he so desired. In our opinion, however, it is only fair that the carriers first be given the opportunity to settle a claim on a voluntary basis without having to contend with vexing and perhaps unnecessary litigation which these bills, absent this or a similar amendment, could generate.

Sincerely yours,

GEORGE M. STAFFORD, *Acting Chairman.*

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., June 11, 1969.

Hon. WARREN G. MAGNUSON,[1]
Chairman, Committee on Commerce, U.S. Senate,
Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1653, a bill to amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property.

Section 20(11) of the Interstate Commerce Act (49 U.S.C. 20(11)) provides that any common carrier, railroad, or transportation company shall be liable for the full, actual loss, damage, or injury to property of a lawful holder of a bill of lading or receipt. No provision is made, however, for allowance of attorney fees in the case of successful maintenance of an action to recover damages for the loss.

S. 1653 would amend Section 20(11) so that a prevailing plaintiff in any action against carriers subject to the Act for loss, damage, or injury to property would be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit. This amendment would afford relief similar to that provided for in Sections 8, 16(2), 308(b) and 308(e) (49 U.S.C. 8, 16(2), 908(b), 908(e))

[1] This report addressed to Senator Magnuson was forwarded to the Interstate Commerce Committee in response to a request for a report on S. 1653 by Chairman Harley O. Staggers, House Interstate and Foreign Commerce Committee.

which relate to actions on reparations, enforcement of Commission orders and the like.

While we are aware that this legislation may be subject to abuse in some instances, especially those involving small carriers, on balance we believe that the public interest would be served by its enactment.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

DEPARTMENT OF TRANSPORTATION,
OFFICE OF THE SECRETARY,
Washington, D.C., June 18, 1969.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in reply to your request for the views of this Department with respect to H.R. 8138, a bill "To amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property."

H.R. 8138 would amend paragraph 11, section 20 of the Interstate Commerce Act, which relates to the liability of any common carrier, railroad, or transportation company to the holder of a bill of lading for loss, damage, or injury to property, by adding an additional *proviso* allowing a reasonable attorney's fee to a successful plaintiff in an action under that paragraph. The attorney's fee would be taxed and collected as part of the suit. The amendment would be applicable to motor carriers and freight forwarders, as well as railroads.

This bill is identical to H.R. 2764 which was introduced during the first session of the 90th Congress. In our comments to you on that bill, we expressed concern over the potential for abuse contained in the bill as drafted. Our concern was that a shipper with a meritorious claim might resort to litigation, rather than out-of-court settlement, since he would be assured of recovering attorney's fees.

The Department would have no objection to enactment of H.R. 8138, provided it were amended to incorporate measures to prevent abuse of the relief basically provided by the recovery provisions.

The Department believes the bill should be amended to provide that (1) a fee not exceed the amount of the judgment; (2) a fee be allowed only where the plaintiff shows he has filed a claim with the carrier which was not paid within 90 days; and (3) the judgment rendered in the plaintiff's favor be greater than any amount previously offered in settlement. With these amendments, the Department would recommend enactment of H.R. 8138.

We have been advised by the Bureau of the Budget that there would be no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

CHARLES D. BAKER,
Deputy Under Secretary.

Mr. DINGELL. Our first witness this morning will be Mr. William S. Story, executive vice president, Institute of Scrap Iron & Steel. Please identify the gentleman seated at the table with you, sir.

STATEMENT OF WILLIAM S. STORY, EXECUTIVE VICE PRESIDENT, INSTITUTE OF SCRAP IRON & STEEL, INC.; ACCOMPANIED BY DR. HERSCHEL CUTLER, TRANSPORTATION CONSULTANT

Mr. STORY. My name is William S. Story. I am executive vice president of the Institute of Scrap Iron & Steel, Inc., the national trade association representing approximately 1,300 shippers, brokers, and processors of iron and steel scrap and related commodities, and indus-

try suppliers. My office is located at 1729 H Street NW., Washington, D.C. This statement is made on behalf of the institute and its membership.

With me is Dr. Herschel Cutler, who is transportation consultant to the Institute of Scrap Iron & Steel.

Iron and steel scrap is a significant commodity moving by rail in interstate commerce, being transported almost exclusively in open-top gondolas. Shippers of ferrous scrap pay in excess of $100 million annually in railroad freight charges. The railroad is the key outbound carrier since most major consumers of scrap at present will not accept truck shipment. Thus, the iron and steel scrap processor is, on his outbound loads, virtually a "captive shipper" and, while certain of our members do have track scales to weigh outbound loads, the majority of scrap processors must rely on railroad scales to establish the shipping weight.

Shippers of iron and steel scrap have been experiencing sharp differences in weight ticket amounts between either the weight found on their own scales or railroad scales at origin, on the one hand, and destination scales, on the other. It is a simple matter of equity to recognize that a given weight, having been accepted by the carrier at origin, should be the same weight delivered at destination. It should be obvious that, unless the carrier delivers what it accepts, the loss is presumably the fault of that carrier. Such, unfortunately, is not the case where weight losses occur in the railroad movement of iron and steel scrap.

Some carriers have met and continue to meet their obligation to deliver the merchandise or assume liability for any loss. Many carriers, however, do not act in such a manner.

For years major segments of the scrap industry were faced with a compromise situation. Carriers would offer to pay 50 percent of the claimed weight loss in recognition, among other factors, of the costly and time-consuming efforts required by both shipper and carrier to progress a lawsuit attempting to obtain 100-percent recovery. In recent months, however, many of these carriers have terminated this understanding and have refused entirely to settle short-weight claims by iron and steel scrap shippers, depriving them of what is theirs unless they are prepared to file suit.

Moreover, even where the 50 percent—or some other compromise—rule is still honored, scrap shippers are denied recovery of the entire shortage unless they are prepared to undertake a suit to recover the legitimately claimed remaining percentage—50 percent or some other amount.

In addition, some carriers refuse to honor any claims whatsoever for a scrap grade known as bundles, best exemplified by baled—crushed—junk auto bodies. The situation at present is, thus, confused since some carriers pay 70 percent of the loss; others pay 50 percent; many pay nothing on some grades of scrap. In the case of certain major scrap-hauling carriers, however, the rule is all-encompassing—"No payment for scrap claims."

The Institute has long advised its membership that 100 percent of the weight loss is a claimable item and 100 percent, not 50 percent or 40 percent or even 70 percent, is the proper entitlement under the concept of common carriage. The problem, however, is that the individual member often is a small local processor, who does not

generally have an attorney under retainer, and therefore, who would be required to bear the expense of litigation even if he should prevail in a court.

There is no need, I am sure, to point out to this committee the magnitude of the solid waste disposal problem that confronts our Nation today. Junk car abandonments, solid waste accumulations and the need to beautify our landscape are all well known to you. It is the iron and steel scrap processor who is a key element in the solution for it is he who has the skill, investment and "know-how" to process much of this accumulation. This industry is attempting to meet the needs of society while facing serious handicaps. For example, railroad rates are going up and the quality of rail service is going down. As rail rates rise, the scrap market area shrinks and the accumulation of obsolete scrap becomes more threatening. Of particular relevance to this committee at this time is the inability to recover legitimate claims from the carriers which results in increased operating costs and thus complicates further the solid waste problem.

Iron and steel scrap is a low-valued commodity. Should a weight shortage of one or a few tons be claimed and suit instituted following rejection of the claim, the legal fees would easily exceed the amount recovered, especially since until recently the 50-percent rule was generally honored. The low value of our product thus means that a scrap shipper cannot go to court for relief. The effect of the economic realities of life was, and is, to limit the alternatives for the scrap shipper and to preclude his suing to recover those sums which are his, but which are presently foregone because the legal cost of the suit—whether he wins or loses—is borne by him.

It is most illuminating and descriptive of the carriers' attitude to cite a recent court proceeding (U.S. District Court, Northern District of Illinois, eastern division, 69C 189) wherein the carrier submitted to judgment and paid the entire claim amounting to approximately $1,100 only after the scrap processor undertook legal action costing many multiples of that sum. Now that the proceeding has been completed and the claim paid, the same carrier continues to refuse to honor claims being filed by the same processor under the same conditions. It is clearly demonstrative of the carriers' attitude which assumes that scrap shippers will not prosecute in courts of law because of the costs involved. Certainly, equity demands that scrap shippers not be forced to incur litigation expenses to recover legitimate claims which, as in this instance cited, total only a portion of the costs involved. Nothing could more clearly portray the unreasonable posture of the carriers vis-a-vis the ferrous scrap shipper who faces weight shortages resulting from rail service.

The carriers with their large law departments, aware of the cost problems facing a scrap shipper who decides to pursue equity in a court, are in a superior negotiating position and the small shipper, who is the characteristic shipper in this industry, is unable to offset this power. It is only a matter of time usually before he accepts the compromise offered or he finds that the rejected claim is "the end of the road" because he cannot afford to go further. Certainly, the Interstate Commerce Act never envisioned allowing the carriers to abort their legal obligations in this manner. Certainly the Congress will find rea-

son to close this "loophole" which is denying all sense of fairness and carrier responsibility.

In February 1970 this Institute undertook a survey of its membership to establish certain key parameters of the loss and damage problem. The questionnaire developed statistically significant data including extensive documentation of the problem. The following questions were asked:

1. Are the railroads settling the loss-in-transit claims you file?
2. If so, what average settlement percentage do you receive?
3. What is the average elapsed time between filing the claim and settlement?

The answers demonstrate the severity of our problem. For example, two in five of our members responding said that the railroads are not settling the loss-in-transit claims they file. Thus, almost 40 percent are getting no settlement whatever.

Even among those who receive settlement, the numbers are astounding. For example, 25 percent receive less than 50 percent of the claim's value, 24 percent receive between 50 and 74 percent of the claim's value; 20 percent receive between 75 and 99 percent of the value of the claim, and only 30 percent receive 100 percent settlement. Thus, averaging this, only 18 percent of the total claims filed are settled at 100 percent of the value of the loss (30 percent of the 60 percent who report that their claims are settled).

Finally, the delay involved is unreasonably long even when settlement follows. For example, only 1 percent of the successful claimants received settlement in less than 30 days after the date of filing. On the other hand, 56 percent of the successful claimants waited in excess of 6 months to settle and fully one in five waited longer than a year before final settlement.

The record of settlement clearly reflects the weak bargaining power of the typical ferrous scrap shipper who cannot offset the strength of the railroad.

It must be stressed that if the carriers find they are unable to avoid payment of legitimate claims through artful use of time, delaying tactics and bone-tossing compromises to scrap shippers, they might well find it more useful to devote the time and energy so expended to the development of reasonable methods of loss prevention so that claims will be filed only in the rare movement.

The Institute, therefore, supports the principle spelled out in all of the bills under consideration. However, because there is adequate reason to establish reasonable time parameters, we urge the passage of S. 1653 as amended—H.R. 17368, which includes the provision not found in the other bills establishing a 90-day period during which time the carriers are given the opportunity to settle the claim at issue.

It is toward the long-run goal of claims prevention that the Institute is suggesting the "balancing" of position between the carriers and the scrap shippers. The motivation to improve the handling of commodities will be significantly strengthened if the carriers are made to pay legitimate claims for scrap shortages. It is cheaper today to lose the commodity and not pay the claim, through a series of time-consuming and expensive gyrations, than it is to stop the claim from arising in the first place.

Passage of the attorneys' fees bill—S. 1653 as amended, or H.R. 17367—will lead to a reduction in losses because claims prevention practices will improve to avoid liability for such loss. Requiring the losing carrier to pay the legal costs will result in a positive step in the direction of improved carrier service and the return of common carrier status to the transportation industry.

Mr. Chairman, that concludes my statement. I am available for any questions.

Mr. DINGELL. Mr. Kuykendall?

Mr. KUYKENDALL. Well, we are refereeing everything here. This is a new one.

Out of a shipment of, let's say, a million tons of scrap, or 100,000 tons—take your figure—from point of origin over a period of a year, let's say, industrywide, how big is this loss?

You use percentages throughout your report. They are absolutely meaningless to us. To be frank with you, unless Mr. Dingell has spent all night studying, and he looks like he got some sleep, so I don't think he has, neither of us really know what you are talking about. I know I don't.

So let's start out by asking this question: How big is the loss of the total tonnage shipped from point of origin to the mill, to the foundry, or wherever you are sending it? How much is lost over a year?

Dr. CUTLER. It is a very difficult question to answer, Mr. Congressman. First of all, if I may, the percentages reflect not the tonnage, but the number of claims filed, which are refused, and so forth.

Mr. KUYKENDALL. I realize that, but you see, the economic health of the overall shipping industry, as well as justice, is the business of this committee. So we really need some evidence to show we are not nitpicking with this committee's time. So please give us that evidence.

Dr. CUTLER. Right, we have no way of establishing right now the total amount of claims lost which are not met in the industry in general. (See letter dated February 5, 1971, p. 12, this hearing.)

Mr. KUYKENDALL. What would be the number of claims met and not met? Are we talking about 15 or 20 percent, or 1 percent? I don't understand how you can lose scrap metal myself. I have never heard of a scrap metal pilferage case in my life.

Mr. STORY. I have seen pictures in our files where there are truck tire marks on the soft ground in a railroad marshaling yard. It is obvious that a truck has been backed up to the side of a car of scrap while it is waiting there, the scrap is lifted off. I am sure you have seen trucks go down the road with cranes on the back of them. They are capable of carrying magnets, and with a magnet you can lift the scrap off.

Mr. KUYKENDALL. Has there ever been a conviction in such a case?

Mr. STORY. The railroad police have never been able to carry forward a successful prosecution. To our knowledge, they rarely catch anybody. But we know, based on the complaints of our members and the claims they tell us they file, scrap is weighed at origin, and when it arrives at destination, there is a substantial loss in weight, and one has to assume it is pilferage.

Mr. KUYKENDALL. It would almost have to be. There are perishables that lose weight, but I can't imagine in this case what would cause it except loss or pilferage.

But we must know in this committee the magnitude of this situation. Let me say this: I am not one bit sympathetic, not at all, and I will just tell you right now, with the idea of paying legal fees for doing a job that the ICC and the railroads ought to be doing, period. Because if we start paying legal fees that amount to more than the claim out of the taxpayers' pockets, and in the end that is where it comes from, believe me, every committee on this Hill with its related business will have a deluge of such things.

I am sympathetic with the problem, and I would like to know the magnitude of it. I think the ICC, for instance, has a responsibility here, which I assure you we will get into. I am not sympathetic with the vehicle of this bill at all. It turns me off completely, but I can assure you that the railroads are in worse shape financially than the legal profession is, and this is my main concern here.

But I am also concerned with justice, and you people are getting the short end of this thing and I want to try to do something about it, and that is also what we are here for.

Dr. CUTLER. Our purpose in supporting the bill is not to make the railroads pay more claims. We are convinced the claims can be avoided. This would be the incentive for them to get into claims prevention programs. There would not be a rash of suits, but a rash of settlements, based on what should be done at the present time.

Mr. KUYKENDALL. What you really want is prevention, and this is very constructive.

Dr. CUTLER. Yes. We feel, unfortunately, that it is necessary to provide this as the incentive, that the cost is so great, contingently, that there will be a reason to go ahead and turn to a claim prevention program that will avoid the need for going to court.

Mr. KUYKENDALL. Is there any such thing as insurance on this type of thing?

Dr. CUTLER. The common carrier obligation would take care of the need for us to insure.

Mr. KUYKENDALL. Do you know whether the common carrier would have insurance for this?

Dr. CUTLER. He is self-insured.

Mr. STORY. He doesn't carry outside insurance generally. He is self-insured.

Mr. KUYKENDALL. Any kind of a large institution is self-insured. If he funds his own insurance, we have to consider that insurance like any other.

Dr. CUTLER. Theoretically the loss in any commodity is included in the rate for moving that commodity.

I think mishandling of the cars is one cause for loss. We have seen hump yards where commodities known as bundles bounce off.

Mr. KUYKENDALL. How about cars of scrap, how could you lose that?

Dr. CUTLER. We have lost carloads of it. We have situations of cars lost for 2 or 3 years, and the entire value of the scrap is $1,800 or $2,000.

Mr. STORY. This is an instance where the car has been sent to another location than that to which it was destined.

Mr. KUYKENDALL. Believe me, as one member of this committee only, in addition to my belief just stated about the vehicle, let me turn the thing around and say that we want to see some sort of solution here.

The chairman mentioned that he had had similar complaints in the hauling of meat. Maybe this committee could make some suggestions and possibly pass regulations in the area of handling claims that would make it simple for all.

You see, the trend seems to be in certain types of claim insurance and this type thing today away from more legal involvement. You know, the insurance companies on liability, some of them have suggested that everybody pay his own claims completely, and in that way it does away with the vast redtape of litigation, because theoretically if every company carrying liability insurance would end up the same anyway, everybody would save the cost of litigation.

So I think you can see in the whole concept today we are trying to turn away from litigation, not toward it, and if you could offer us some suggestions of the possibilities, because the possibilities, to be frank with you, of getting this legislation out in 1970 are not good.

So let's assume we may be back here in February with this same bill, talking about it again. I would personally like some suggestions about what you would suggest the ICC come up with in the way of automatic claims adjustment. If the railroad accepts a car with 60,000 pounds of scrap in it and they don't deliver but 58,000, then what is the automatic obligation, without the matter of lengthy litigation?

So this is something I would like to have some suggestions from you on.

Mr. STORY. Mr. Kuykendall, on September 10 I filed a verified statement before the ICC on rules, regulations, and practices of regulated carriers with respect to the processing of loss and damage claims. In that we respectfully suggested to the Commission that it promulgate the following rules:

1. That all rail carriers must honor claims for shortages reflecting differences in weight between the origin and destination certified weight tickets, though the amount of damage is a judicial function;

2. Where tare and gross weights are available at origin and destination from an approved scale weighed by a certified weighmaster, the carrier is liable for the disparity between weights; and

3. All rail carriers must honor or refuse claims in 90 days, in writing. Any claim not handled by a carrier in that time would result in a fine on the carrier of not more than $1,000 for each delay.

These are our suggestions for improvements in procedures that are currently being followed.

Mr. KUYKENDALL. Thank you, Mr. Chairman.

Mr. DINGELL. Thank you, Mr. Kuykendall.

What are the amounts of losses in individual cases? Mr. Kuykendall has asked you to inform him of the amounts of loss overall. What are these amounts of losses in cases?

Dr. CUTLER. Mr. Chairman, it ranges anywhere from a thousand pounds up to 100,000 pounds and greater.

Mr. DINGELL. Of loss?

Dr. CUTLER. Yes, per car.

Mr. DINGELL. What would the dollar amount be?

Dr. CUTLER. Depending on the grade of scrap it was, it could be $2,000.

Mr. DINGELL. For 100,000 pounds?

Mr. STORY. If it were stainless steel scrap, which is valued at $300 to $350 a ton, it would be much greater.

Dr. CUTLER. I would like to read part of a turndown letter where there was a hundred thousand pound shortage in a car:

There is no record of car defects or unusual handling responsible or contributory to loss during transit. The movement to destination was with reasonable dispatch. A shortage of 100,000 pounds is reasonably explained by an error in scaling or misreading of scales at one of the points weighed rather than a physical loss of weight.

Under the circumstances we are unable to make any admission of liability, and advise that payment of the claim is respectfully disallowed.

That was not a full car; our carloads run over 100,000 pounds.

Mr. DINGELL. Where is this scrap going, is it being stolen or bounced out along the right-of-way, or what?

Mr. STORY. We have to assume that it is being stolen. Our commodity moves in open-top gondolas, and these are readily open to pilferage, and the material is being taken off in the manner which I described, we assume, and I assume that, again, it is sold back to somebody else. We can't identify scrap.

Mr. DINGELL. Do you ever have carloads vanish?

Mr. STORY. We have had full carloads that have simply gone off the record. No one knows exactly where they have gone, and as I mentioned earlier, we believe that they probably wound up at another consumer and the records were that you just didn't know what happened. We assume the scrap was melted.

Mr. DINGELL. I want you to submit to us information as to losses that your people have suffered. I am sure you have some kind of records or survey. I would like to have that for the record, if you please.

Mr. STORY. We could survey our membership.

(The following letter was received for the record:)

INSTITUTE OF SCRAP IRON & STEEL, INC.,
Washington, D.C., February 5, 1971.

Mr. W. E. WILLIAMSON,
Clerk, Committee on Interstate and Foreign Commerce, House of Representatives, Rayburn House Office Building, Washington, D.C.

Mr. WILLIAMSON. The final statistics of the survey conducted to establish the magnitude of the loss and damage problem facing shippers of ferrous scrap are now available. These data were collected to respond directly to the questions asked during my appearance before the Subcommittee on Transportation and Aeronautics regarding H.R. 9681, et al.

A total of approximately 11% of the active membership returned completed questionaire forms with the following results:

1. During the past year, how much scrap was loaded into cars and was missing at destination?---------- 31,369 tons
2. What was that "missing" scrap worth?---------- $1,038,638.00

These figures provide a forceful insight into the serious claims problem facing ferrous scrap shippers and the magnitude of the losses incurred.

Cordially,

WILLIAM S. STORY, CAE,
Executive Vice President.

Mr. DINGELL. It would be helpful for us to have it.

Is either one of you an attorney?

Mr. STORY. No.

Mr. DINGELL. As I remember the general law, the courts have the power in case of litigation to award damages at the conclusion of litigation.

How is this going to change existing law?

Dr. CUTLER. This would shift the responsibility for the plaintiff's legal costs from the plaintiff.

Mr. DINGELL. No; it wouldn't because under the common law the courts have the power to assess attorneys' fees against the losing party.

Dr. CUTLER. That is correct, sir.

Mr. DINGELL. That being so, and it being a regular practice in Federal court—it has been a long time since I tried a case in Federal court—it is the regular practice of the courts to award attorneys' fees to the winning party.

Dr. CUTLER. Yes, sir.

Mr. DINGELL. And that is part of the prayer that is submitted, and part of the complaint to the court.

Now, how is this going to change existing law? We are saying they can do what has been the longest established practice in the Federal courts. How does this change that?

Dr. CUTLER. The only answer I can give you, Mr. Chairman, and neither of us is an attorney, is that we have never experienced the award of legal fees to any of our members who have brought litigation, and as far as I know, no other shipper has been awarded legal fees either, in a case dealing with claims.

I have in front of me the case that Mr. Story referred to for the $1,100 claim where the legal fees were almost $7,000 and the court order says, "without cost to either party," and that is the general rule we get.

Mr. DINGELL. That is the general rule, but the court has the power to do so. In H.R. 9681 it says that he shall be allowed a reasonable attorney's fee to be collected.

H.R. 9072, by our good friend, Mr. Rogers of Florida, says, "and shall be allowed reasonable attorneys' fees."

S. 1653 says, "provided, further, the court in its discretion may allow reasonable attorneys' fees."

This is S. 1653, and as I read it, it is the present law. It gives the court discretion. It occurs to me it is peculiar to give the court discretion to do something it already has discretion on. Maybe we give it discretion twice to do things it doesn't want to do and isn't doing under present law. But I don't see that you would be better off.

Mr. STORY. It seems to me the passage of a law by the Congress of the United States would draw to the attention of the courts, the seriousness of this situation and bring about some equity which is lacking.

Mr. DINGELL. I think that is something that is going to evoke rather bitter comment by my colleagues. We pass laws that are regularly disregarded by the courts and regulatory agencies.

Mr. KUYKENDALL. To put it in plain language, they sometimes think we are plain silly.

Mr. DINGELL. We try to see to it that the agencies downtown and the courts carry out our wishes, even though the Constitution says they shall so do.

Gentlemen, the committee is grateful to you. I want to ask you a question before you leave, however. The ICC, you indicate that that agency has informal procedures to adjust claims of this kind?

Dr. CUTLER. No, sir. The ICC at the present time will not exercise authority in the claim area. That is the purpose of the investigation that Mr. Story mentioned. It is cited as ex parte 263.

Mr. DINGELL. In the ICC's report on the bill, they say that they have developed a number of informal procedures to assist shippers in these areas.

Have they ever assisted you or members of your organization in regard to claims of this area?

Dr. CUTLER. In getting a settlement of the claim? As far as I know, no, sir.

Mr. STORY. To the best of our knowledge, no, we have had no assistance from ICC.

Mr. DINGELL. Gentlemen, the committee is appreciative.

Mr. Dixon, our counsel, asks is there a representative from the ICC in the room? We will hear from him at a time soon.

Our next witness is Mr. Charles A. Washer, transportation counsel, American Retail Federation.

Are you alone today?

STATEMENT OF CHARLES A. WASHER, TRANSPORTATION COUNSEL, AMERICAN RETAIL FEDERATION

Mr. WASHER. I am alone.

Mr. DINGELL. Proceed in any way you wish.

Mr. WASHER. My name is Charles A. Washer.

The American Retail Federation, being comprised of some 28 national associations and 50 statewide organizations of retailers, includes a composite membership of about 800,000 individual retail establishments from all facets of this nationwide industry. The federation has authorized me to express the reasons underlying its support of the legislation proposed in H.R. 9681, H.R. 9072—I list that one because it was introduced by my Representative, Mr. Rogers—H.R. 8138, and other bills on the same basis as contained in S. 1653 approved by the other House. It is the belief of the members of the federation that enactment of the legislation as proposed will be of tremendous benefit to the smaller retailers and individual consumers.

Over the past years retailers have increasingly complained of problems pertaining to the transportation of merchandise—the failure to receive goods promptly and without loss or damage—particularly on smaller shipments. This condition may stem from the significant increase in crime in transportation, from the changes in the mechanics of handling, or from a lack of interest on the part of management for these disparaged shipments. Whatever the cause, the small, independent retailer suffers a double loss for the deterioration in the quality of transportation service that has been accompanied by difficulties in obtaining satisfactory claim settlements. The furor over claim settlement rules on concealed damage claims by the railroads,

motor carriers and freight forwarders are a case in point. We have long advocated, as an approved policy, that carriers should be encouraged and stimulated to progress programs, practices, and procednres for claim prevention and that this would be jeopardized by any limitation on the liability of the carrier.

You were questioned, Mr. Kuykendall, about the amounts. The ATA testified, and they indicated that their direct payments for loss and damage expense in 1968 was $183.5 million. That is what they actually paid. That doesn't represent how much was filed with them and how much they declined.

They paid one of the largest amounts, on one item, clothing, on which the total amount of claims paid was 9 percent. It represents payments for the loss of clothing.

Mr. KUYKENDALL. Nine percent of what?

Mr. WASHER. Nine percent of the $183 million, as I understand it.

They list clothing that just disappeared in transit. They don't distinguish between articles that are stolen and those that are lost.

We are also participating in ICC Docket Ex Parte 263, the investigation into the rules, regulations, and practices of the carriers with respect to the processing of claims and certain aspects of antitrust immunity for standard carrier agreements as to claims. These procedures do not provide any reason for delay on the proposed legislation, they emphasize the need for it. The ICC has no jurisdiction in the determination of the merits of any claim since the adjudication of disputes made under a contract of bailment for the transportation or handling of goods and the award of monetary damages for failures of the carriers to deliver shipments in accordance with such agreements are matters within the jurisdiction of the courts.

The federation view is that the carrier, in the cases in which damage-free transportation is not provided or where some shipment is lost, should avoid causing the retailer double loss by adjusting claims uniformly, expeditiously, and justly. The provision for the recovery of attorneys' fees might result in some court actions that would be prohibitive today because of the small amount of the claim but, of more importance, the possibility of this should be an incentive to encourage fair claim settlement practices by the carriers. In other words, if I may interject, the fear that you have of a multiplicity of suits, we don't anticipate. Just the fact that that could happen should result in adjusting the claim practices and avoid the necessity of even going to court.

With enactment of this legislation the small retailer or individual shipper would no longer be under a handicap in dealing with a carrier on claim problems—a handicap that is inherent in the restricted amount of traffic tendered to the carrier, the relative size of the shipper in relation to the carrier, and the amount involved. We view the proposal as requiring the carriers to give equitable consideration to all claims regardless of the factor of possible legal action based on adjudication costs.

The suggested amendment, and this one was suggested by the ICC and the DOT in supporting this legislation, providing for in initial submission to the carriers and a 90-day period for voluntary settlement prior to the maintenance of a successful court action seems desir-

able and we have no objection to the incorporation of this proviso. We do not believe any other amendments are necessary or desirable and we have no objection to the incorporation of this proviso. That is contained in S. 1653. No exemption should be given motorbus operators for although restricted liability exists as to passenger baggage, the package services have been a significant boon in the small shipment field and of importance to small retailers and individuals—the ones that need the benefits of the legislation.

The American Trucking Association has evidently been suffering under the illusion that the problem is principally that of the railroads and household goods movers. We hasten to say that with retailers the most critical problems occur with common motor carriage and freight forwarders. I understand that the latter, and the railroads, fear the development of "claim sharks." While equitable claim practices would leave no field for such operations, the amending language contained in S. 1653 substituting "may" for "shall"—as I believe the chairman's question was directed to that terminology—as to the granting of the award of attorneys' fees and the recognition that "reasonable" could include the possibility of withholding that grant, the courts would have ample leeway to deal with any practices that were not in keeping with the purposes of the provisions.

We particularly urge the rejection of any amendment proposing to make a limitation on the fees to be lesser in amount to the value of the claim. The court has the power to deal with the recovery of amounts considered minimal and with the reasonableness of the attorneys' fees to be awarded. In actual practice, the cost of preparing a claim, said to be in the neighborhood of $10 to $15, prevents most shippers from even filing for relatively small amounts. But most importantly such a restriction would place a limit on filing a test case representative of a number of like claims, each of which would involve a small amount.

The retail industry is that which is closest to the ultimate consumer and, in many cases, has entrusted the final delivery of goods to that consumer to the common carrier. From this experience it is our view that the problems of that individual consumer are similar to those experienced by the small retailer. In their behalf, as well as our own, we recommend enactment of the proposed legislation as a means of inaugurating equitable, uniform, prompt claim settlements on the part of the carriers.

Thank you for the privilege of presenting these views to you today.

We think it would be more expeditious to approve S. 1653, because this has already incorporated two amendments, the 90-day and the "may" instead of the "shall" in reference to the awarding of attorneys' fees, and either amendment of the House bill to coincide with that would probably allow for an easier passage.

Mr. DINGELL. Thank you very much, Mr. Washer.

Mr. Kuykendall?

Mr. KUYKENDALL. No questions.

Mr. DINGELL. You are an attorney, sir?

Mr. WASHER. Yes, sir.

Mr. DINGELL. It is some time since I have practiced in Federal court, but under the Federal Rules of Civil Procedure and under appropriate statutes, as I recall them, the Federal courts have the power at this time to award attorneys' fees in litigation.

Mr. WASHER. I was a little startled when I heard you question the previous witnesses on that, because I was under the impression that that was a remote possibility.

Mr. DINGELL. But under the rules they have the power to so do at this time; do they not?

Mr. WASHER. I am not certain. I do know this, Mr. Chairman, in the Senate the question must have come up, because in the original hearings on S. 858, which were held before Senator Lauche, there were reproduced in those hearings the question and answer, because that question was submitted to the Legislative Reference Service and you will find in there about four or five or six pages dealing with the award of attorneys' fees after analyzing all of the Federal statutes and all of the State statutes.

So this has already been accomplished, and there must have been some question, or Senator Magnuson wouldn't have referred the question to the Legislative Reference Service.

Their conclusion is that it is fairly rare for attorneys' fees to be awarded to either party in the discretion of the court or to the prevailing party, especially in State law.

Mr. DINGELL. Just a minute. You have not told me that they do not have the power. You have said that it is rare for attorneys' fees to be awarded to either party.

Mr. WASHER. Right.

Mr. DINGELL. My question was different, sir. It said, "Do the courts have the power to award attorneys' fees to either litigant in a case where there is a judgment awarded?"

My recollection, and it is a long time since I looked at the statutes on this matter, is that the courts do have the power. Now, whether they exercise it is another question. The question I am directing to you is, do they have the power to do so now?

Mr. WASHER. I do not know. That I cannot say, sir.

Mr. DINGELL. Mr. Magnuson over in the Senate spent a great deal of time having them tell whether or not attorneys' fees are awarded, not whether the courts have the power, and there is a very big difference here.

Mr. WASHER. Not to us, sir.

Mr. DINGELL. The fact that the courts do award damages would indicate to me that they have the power at this moment.

Mr. WASHER. If that power is exercised only rarely, we would much prefer to have the Interstate Commerce Commission Act amended, as they have so amended numerous other sections of Federal statutes, so as to indicate that it is the intent of Congress that such awards could be given.

Mr. DINGELL. Now you are getting to a point I want to address ourselves to at a time later, but as of this particular moment we have before us three bills—H.R. 9681 and another similar bill, and S. 1653. H.R. 9681 and the other bill before this committee require that reasonable attorneys' fees be awarded and collected as part of the suit.

S. 1653 says that such fees may be awarded in the discretion of the court.

Now, if the courts have the power to award attorneys' fees under existing law, and I think it is true, how are your people and the others

who are interested in this legislation going to be particularly bettered by S. 1653, since it awards the court a power which it now has but rarely used?

Mr. WASHER. We will be helped, sir, because this would indicate as part of the ICC Act that the court——

Mr. DINGELL. Now, wait a minute. It says "may." The courts have the power to do it now and they are disregarding it. How are you going to be appreciably bettered by giving them power in this legislation which they now have and are disregarding?

Mr. WASHER. If the courts have this law, you should have no hesitancy in adopting the legislation, because it wouldn't change anything.

Mr. DINGELL. Are you an advocate of reenacting statutes that have been disregarded, or of seeking a remedy which will more directly and appropriately handle the problem we have?

I think we are agreed here, you clearly have a problem with small claims; is that correct?

Mr. WASHER. That is right, sir.

Mr. DINGELL. And you have a problem where litigation in the Federal courts is far too expensive; isn't that correct?

Mr. WASHER. That is right.

Mr. DINGELL. And as a result, litigants are either frozen out of the Federal courts on an economic basis, or they are denied a recovery which really makes themselves whole; is that correct?

Mr. WASHER. That is our contention, sir.

Mr. DINGELL. Because they fail to get attorneys' fees.

Over the long history of the country, it is my experience that attorneys' fees awarded in litigation are usually far less than the actual cost of the attorneys' services to the litigant. Am I correct on this matter?

Mr. WASHER. I wouldn't know about that, sir.

Mr. DINGELL. Well, from my experience, they are so low as to be almost laughable in relation to the real costs of procuring the services of an attorney. You are not saying they are adequate; are you?

Mr. WASHER. No. My only point, sir, is that once you amend the Interstate Commerce Commission Act, and in a good many cases the courts look at the statutory provision in the Interstate Commerce Act, and if we have in the act as it is so amended this proviso which indicates that the courts have that power——

Mr. DINGELL. How are the courts going to pay any more attention to the Interstate Commerce Commission Act than they do to the Federal rules of civil procedure, and rules dealing with the judiciary? How is amending the Interstate Commerce Commission Act going to change anything?

It would simply give them additional discretion to disregard what they are disregarding now.

Mr. WASHER. I think it will help. As I mentioned in an aside to Mr. Knykendall, we don't anticipate we would ever go to court. The fact that this is in there would change the practices.

Mr. DINGELL. My friend, you are existing on the thinnest kind of hope here. Reenacting existing legislative power is repugnant to me. Second of all, to come out with a remedy that is going to give us a successful operation followed immediately by the death of the patient is equally foolish to me.

Wouldn't you be far better off to have an orderly procedure, inside the ICC, created to solve this problem?

Mr. WASHER. First of all, sir, you are going to have to give the ICC power to handle claims directly. They don't have that.

Mr. DINGELL. I am fully aware of that. Wouldn't you be better off with an expeditious procedure within the ICC?

Mr. WASHER. There are some people who feel that way, and there are other people. I should say there has been a growth of litigation recently in small claims courts throughout the country. A good many organizations are urging their small shippers to go into small claims courts.

So we are having a proliferation of these claims or suits now. Whether it would be best in the ICC, whether it should stay in the courts, we haven't reached any opinion. As of today, the Commission has no jurisdiction.

Mr. KUYKENDALL. Would you yield?

I think you missed the point that the Chairman and I were making.

First, we would like to keep you out of the courts. The courts have too much to do already.

Mr. WASHER. We agree.

Mr. KUYKENDALL. So the direction that occurs to me in this short 45 minutes we have been talking here is a better system of claim insurance carried by the carrier, who will end up paying for the extra premiums if there are any, and I am sure there would be, and it ends up in the hands of the consumer. But let's hope that would be more than offset by your savings on freight rates, or, rather, by the manufacturer, which could save there, but it seems to me that we would need to know, for instance, how does the average carrier insure claims?

We were assured earlier by the preceding witness that it was his opinion that most carriers are self-insured on claims.

Mr. WASHER. I think he was referring to the railroads primarily.

Mr. KUYKENDALL. All right. We are going to have the carriers in here on this proposal, certainly, and I shall question them as to how they insure claims or how they insure against claims.

Now, here is something that occurs to me. If we get into this matter of an orderly insurance of claims under the ICC, I think the Chairman would agree with me that we would probably need a little better system of acceptance of a load, whether it be clothing or scrap iron, and we can take the extremes here, as to what the real value of it was when they accepted it.

What is the value of the load when they accept it? I don't know whether there is such a procedure.

Mr. WASHER. That is done in the claim.

Mr. KUYKENDALL. I mean when they pick up the load from you sir, as a shipper.

Mr. WASHER. Oh.

Mr. KUYKENDALL. It would seem to me before we get into a really orderly way of handling this thing that that load has to be valued on the front end.

Mr. WASHER. That is the worst thing we think you could do, because you then put a price tag on that shipment and you make it even more subject to pilferage.

Mr. KUYKENDELL. Well, the reason for your misunderstanding in claims—there has never been a suit of clothes lost in airline baggage

that didn't cost $250. Now, remember that. There has never been a Robert Hall suit of clothes lost on an airplane. Everybody knows that. You know it and I know that, so before we get into any reasonable understanding between the two parties involved, the shipper and the carrier, about the processing of claims, we are going to have to have some sort of an agreement on the front end as to what it is worth. A container of fine suits of cloth is a very different thing. I see that.

Mr. WASHER. No, sir. You are comparing passenger baggage, on which there is a limitation.

Mr. KUYKENDALL. I am talking about shipping it by freight forwarders.

Mr. WASHER. If you submit a claim to a carrier and you do not support that with a certified copy of the invoice, the claim is immediately rejected. There is no question of the actual value.

Mr. KUYKENDALL. Is there a question on the front end when he accepts the freight what the value is?

Mr. WASHER. No. The carrier isn't given a copy of the invoice at the time the shipment is made. In the case of certain selected articles that are placed in the classification in which there is a wide range of values, the ICC has authorized them to establish released rates or declared values.

In those cases they do know how much it is.

Mr. KUYKENDALL. Let me say I think you had better accept this from this committee. You see, this committee negotiates a lot more than it rules. This committee is kind of a place where we referee fights about half our time, and we do a pretty good job of it, I think, between modes and parts of the transportation system.

Looking at your problem and looking at what I think the solution must be, I see only some simplified claim method, a simplified claim method, not necessarily more litigation.

Now, I would suspect, sir, that if this suggested type legislation should ever come out of this committee, the payment of legal fees would be a two-sided coin.

I would insist that the paying of legal fees be paid by the loser, regardless of who he is. So this is something I shall insist on if this bill gets even close to coming out of this committee, and the reason I am insisting on it is that I want both sides of the thing to feel responsibility toward an equitable settlement.

Now, with that understanding, let's talk. I am telling you now that that is what I am going to insist be in the bill if it ever comes out of the committee, because I will not give license to the legal profession on a strictly one-sided situation.

Now, let's talk about the matter of insurance carried on a mandatory basis by the carrier, self-insured or otherwise, to cover losses and an orderly procedure of processing claims on a quick basis.

It seems to me that that has to be the answer, because it is not the inclination of the Chairman to pass a bill on top of a bill here today, and it is not the inclination of the speaker here to put in a one-sided situation on the loser of a lawsuit or of a claim here.

Mr. WASHER. Sir, if I could just make two comments:

First of all, we don't see the two-sided aspect of this.

Mr. KUYKENDALL. I am sure you don't, but I do.

Mr. WASHER. The carrier has had an opportunity, and we insist that the claim go to a carrier, in which case he may study it, he can determine what a fair settlement is.

Now, when we are dealing with an individual small retail store vis-a-vis the largest truckline or a very large truckline, or the Penn Central, or whatever you have, when he has that claim declined, then he is faced with a problem of either going and absorbing that loss or going to court.

If he goes to the trouble to prepare a case to go to court, we don't think it is necessarily equitable in case he loses to award the other side attorneys' fees. He has already had to have his own attorneys' fees, plus the loss.

Mr. KUYKENDALL. Hadn't you rather he would make a settlement on the front end?

Mr. WASHER. Yes, we do, we want fair settlements. We are trying to avoid going to court at all.

Mr. KUYKENDALL. That is right. It seems to me you need more help in this direction, sir, than you do in court.

Mr. WASHER. May I just read you two sentences from the Commission's order of investigation when they ordered Ex Parte 263 investigated?

Their notice of the order on the 29th of January 1970 said, and this is on sheet four:

> In addition to the carrier rules, regulations and practices concerning concealed loss and damage claims questioned by petitioners——

That is, the shippers—

> this Commission has become aware of instances in which a carrier deliberately or unreasonably either delays a determination as to its liability on claims of shippers and receivers for loss and damage, or fails to pay such claims, even though the carrier has determined that it is, in fact, liable thereon in whole or in part, until and unless the claimant vigorously presses for payment. In this connection, a substantial percentage of motor carrier service complaints received by this Commission relate in the manner in which such carriers handle or fail to handle loss and damage claims.

That is the situation.

Mr. KUYKENDALL. You have convinced me that I am right. You have convinced me that the process of handling claims, that there should be ICC regulations with time limits.

Mr. WASHER. That we will determine in Ex Parte 263, yes, sir. We hope that we determine that in Ex Parte 263.

Mr. KUYKENDALL. Well, sir, let me say this before I close, Mr. Chairman.

You should be convinced after the last 30 minutes that we are not sold. I think you should be convinced of the direction in which we think you should go. You should be convinced that we know you have a problem and we would like to help you solve the problem, but at least the two of us here are absolutely convinced that this court route is not the route to go.

I have offered a route here that I will support. I don't know the details of it at all, but it is a route that I will support. But a concealed—and you used the term—claim, is that correct? I have no doubt it would happen, absolutely no doubt it would happen.

So for that reason, as much as any other, the burdening of the courts, and Mr. Dingell, being an attorney, mentioned the fact that according to his best judgment the myriad of small awards being made to the lawyers in the end won't amount to anything.

Thank you, Mr. Chairman.

Mr. DINGELL. Thank you, Mr. Kuykendall.

Mr. Washer, the committee is grateful to you for being here this morning. Thank you very much.

Mr. WASHER. Thank you.

Mr. DINGELL. Our next witness is Mr. John H. Frazier, Jr., accompanied by Mr. Rodman Kober, National Grain and Feed Association.

Please identify yourselves for the purposes of the record.

STATEMENT OF JOHN H. FRAZIER, JR., FIRST VICE PRESIDENT, NATIONAL GRAIN & FEED ASSOCIATION; ACCOMPANIED BY RODMAN KOBER, CHAIRMAN, TRANSPORTATION COMMITTEE

Mr. FRAZIER. Mr. Chairman, I am John H. Frazier, Jr. I am the first vice president of the National Grain and Feed Association. With me is Mr. Rodman Kober, chairman of the National's Transportation Committee. I am with Hennessy, Mayer & Co., and Mr. Kober is with Louis Dreyfus Corp. Mr. Kober is an attorney, and I think Mr. Kober will be able to clear up a few things that have come up here in the last half-hour or so.

I appear here today on behalf of the National Grain & Feed Association in support of your bill H.R. 9681 and companion measures, which would allow the recovery of reasonable attorneys' fees by the successful plaintiff in an action for recovery of loss or damage sustained in the transportation of property.

The National Grain & Feed Association is nationwide and industrywide in scope, representing every segment of the industry from the smallest country elevator to the largest grain and feed complexes, including processes. Forty-one of our State and regional associations affiliated with the Nation, representing about 15,000 grain and feed firms, have specifically endorsed this statement. I would like to have the names of these associations included in the record. Among those are the Michigan Bean Shippers Association, the Michigan Grain & Agri-Dealers Association and the Mid-South Soy Bean and Grain Shippers Association.

I would like to have the names of the 41 associations included in the record.

Mr. DINGELL. Without objection, it is so ordered.

(The list referred to follows:)

ASSOCIATIONS WHICH HAVE ENDORSED THE STATEMENT OF THE NATIONAL GRAIN AND FEED ASSOCIATION ON H.R. 9681 AND COMPANION BILLS AND S. 1653

American Dehydrators Association
Arkansas Drier & Warehouseman's Association, Inc.
California Grain and Feed Association
Carolinas-Virginia Grain and Feed Dealers Association
Colorado Grain & Feed Dealers Association
Distillers Feed Research Council, Incorporated
Eastern Federation of Feed Merchants, Incorporated
Farmers Grain Dealers Association of Illinois
Farmers Elevator Association of South Dakota

Farmers Grain Dealers Association of North Dakota
Federation of Cash Grain Commission Merchants Association
Georgia Feed Association, Incorporated
Grain Elevator & Processing Society
Idaho Feed & Grain Association, Incorporated
Illinois Grain & Feed Association
Indiana Grain and Feed Dealers Association Incorporated
Iowa Grain & Feed Association
Kansas Grain and Feed Dealers Association
Kentucky Feed & Grain Association
Michigan Bean Shippers Association
Michigan Grain & Agri-Dealers Association
Midsouth Soybean & Grain Shippers Association
The Minneapolis Grain Commission Merchants Association
Mississippi Feed & Grain Association
Missouri Ag. Industries Council
National Association of Chief Grain Inspectors
Nebraska Grain and Feed Dealers Association
New England Grain and Feed Council
New Mexico Grain and Feed Dealers Association
Northwest Country Elevator Association
Ohio Grain, Feed and Fertilizer Association, Incorporated
Oklahoma Grain and Feed Dealers Association
Oregon Feed, Seed and Suppliers Association
Pacific Northwest Grain Dealers Association, Incorporated
Panhandle Grain and Feed Dealers Association
Pennsylvania Millers & Feed Dealers Association
Texas Grain and Feed Association
Utah Feed Manufacturers and Dealers Association
West Virginia Farm Supply Association
Wisconsin Feed, Seed and Farm Supply Association, Incorporated
The Wyoming Grain, Feed and Seed Dealers Association

Mr. FRAZIER. H.R. 9681 is identical to S. 1653 as introduced in the Senate. This bill had the support of the Comptroller General, the Secretary of Agriculture, the Deputy Attorney General, the Department of Transportation, and the Interstate Commerce Commission. The latter two recommended a 90-day "cooling-off" period which was accepted by the Senate. The bill has the full support of shippers' groups and is opposed by the regulated carriers.

The Senate Committee on Commerce amended S. 1653 to include the recommendation of the Department of Transportation and the Interstate Commerce Commission, and further amended it to grant the court discretion in the award of the attorneys' fees. As passed by the Senate by unanimous consent on January 26, 1970, the bill contains the following language:

> That the court, in its discretion, may allow a reasonable attorney's fee to the plaintiff in any successful action, to be taxed and collected as part of the suit, but no such fees shall be allowed to the plaintiff except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and that such claim has not been paid within ninety days after receipt of the claim by the carrier or its agent.

We are in agreement with, and strongly support, the present language of S. 1653 and respectfully suggest similar amendments to H.R. 9681 and urge its prompt passage.

S. 1653—the attorneys' fees bill—is one of the most important pieces of legislation on which our national association has testified in recent years. Because of this, and since we are speaking for so many organizations, we would like to explain our position in some detail. Also, since we are one of the first witnesses, our statement will lay the groundwork for other witnesses that follow.

Mr. Chairman, I would like to discuss the practical application of the need for this legislation to our industry and then have Mr. Rodman Kober discuss the legal justification. I am confident when we conclude our testimony, you will appreciate the need to our industry for S. 1653.

Grain, feed, and grain products constitute one of the largest commodities shipped in the United States. Some of the equipment which we receive for these shipments is in a poor state of repair; but, because of shortages, we are forced to use the marginal equipment. Furthermore, the railroads insist that we load each car to full capacity and to what many consider overcapacity. These conditions, together with the vibrations over the roadbed, cause losses of grain. However, when the car is at rest and is inspected, there is no grain leaking and the car is then known as a "clear record" car. Losses occur for other reasons such as theft, pilferage, and paper grain doors.

Mr. KUYKENDALL. What is a paper grain door?

Mr. FRAZIER. That is a door that is put into the opening of the car where the doors open so that the grain will not come out, and when the door is made of paper, it is called a paper grain door. It is merely tacked in there.

Mr. KUYKENDALL. Thank you.

Mr. FRAZIER. Instances have been known where holes in the bottom of grain cars have been repaired in transit after a partial loss of lading with the car showing no evidence of loss to the grain inspector at the time of arrival. When the car is weighed, the amount of loss can be determined by a comparison with the origin weight. These losses occur when the carrier is in complete control of the lading. The shipper or receiver submits a claim for his loss. The carrier may offer a settlement which the claimant may accept or reject. The claimant knows, however, that if he rejects the offer of settlement, his only recourse is to file a suit where his attorneys' fees may equal or exceed his recovery. The carriers are also aware of this situation, and many offers of settlement are reduced accordingly.

This situation, with the grain shipper in an inequitable bargaining position regarding claims, became extremely aggravated when on April 1, 1966, the Traffic Executives Association—Eastern Railroads—adopted a new policy regarding claims on "clear record" cars. We were shocked by this announcement because we had been consulting with the Southern Freight Association over a period of 2 years on a similar type policy, which the Southern Freight Association had finally rejected. We had had no consultation with the Traffic Executives Association—Eastern Railroads—and received information of the policy change only by mimeograph notice. This new policy on settlement of claims for losses on "clear record" cars arbitrarily reduced claims under differing conditions by 50 percent, 75 percent, or 100 percent.

Mr. Chairman, this new policy was an annual $10 million shock to our industry. We consulted with the railroads. We engaged legal counsel to advise us, and we asked Members of Congress to introduce legislation which would put the shipper in an equitable position with the carriers when claims were presented for settlement.

We are happy that Mr. Friedel introduced H.R. 9681 in the 91st Congress, and we are most appreciative of your conducting these hearings.

Some of the railroads have reverted to their former policy with regard to settlement of claims, which, as I pointed out before, still leaves us in an inequitable position. However, some have retained the April 1, 1966, policy, and when two railroads merged, the giant new system adopted this policy which had not been effective on one of the former railroads. More recently, other carriers and other modes of transportation are adopting arbitrary claims settlement policies. We are fearful that without this important legislation these restrictive policies will spread like a cancerous growth. The fact is that our national association has contemplated for some time the need for the legislation proposed in S. 1653, and the claims policy adopted by certain railroads on April 1, 1966, accentuated the dire need for such legislation.

Particularly harmed by this unbalanced bargaining position is the small country elevator or small receiver who is on one railroad line which is his only practical mode of transportation. He is completely at the mercy of that railroad and is in no position to sue for losses, recognizing that he will almost always end up with some loss even when he wins. In a legal suit the attorney's fees can wind up to be more than the recovery on the claim. I would not want to imply that any of us can completely avoid the bad bargaining position—everyone in our industry is hurt by it—but the larger shipper can ship by those lines or those modes which give him good service and fair treatment. It is probable that the smaller the shipper, the more he is hurt percentagewise.

I would be remiss at this point if I failed to recognize that some grain and feed firms have been guilty of poor loading and weighing practices. I met with railroad officials to work out ways of reducing grain losses. More importantly, I have appeared on the convention programs of many of our affiliated associations to discuss the causes for grain losses and to encourage the best possible loading and weighing procedures.

Mr. Chairman, we want losses of grain reduced; we want meritorious claims settled in full; and we want unjust claims discarded. We firmly believe that enactment of S. 1653 would accomplish these objectives by awarding attorneys' fees in meritorious cases. Furthermore, this bill would encourage carriers to provide adequate equipment and establish more effective procedures for claim prevention. It would also encourage them to handle loss and damage claims promptly and equitably.

Some will claim that S. 1653 will result in an enormous number of lawsuits. We do not believe this to be the case because we believe that with each side in an equal bargaining position compromise on both sides would take place and meritorious claims settled in an equitable manner. Nonmeritorious claims would not result in lawsuits as the claimant would know he would have to pay his attorneys' fees himself.

In summary, Mr. Chairman, enactment of S. 1653 would relieve the shipper from being at the mercy of the carriers in claims settlement, would encourage the just settlement of meritorious claims without going to court, and would allow the successful plaintiff to recover reasonable attorneys' fees if suit is necessary. We strongly urge the enactment of S. 1653.

With your permission, I would now like to again introduce Mr. Rodman Kober, so that he may speak to the legal aspects of S. 1653. Mr. Kober.

STATEMENT OF RODMAN KOBER

Mr. KOBER. Mr. Chairman and Mr. Kuykendall.

The legal remedy available to a grain dealer dissatisfied with efforts to settle a freight loss claim with a carrier is set forth in section 20(11) of the Interstate Commerce Act. Although that section provides at length for the disposition of loss and damage claims, it makes no provision for the award of attorneys' fees and other costs to a successful plaintiff in a freight loss or damage suit. This omission has been construed to be fatal to any efforts to collect the expenses of litigation as a part of the award of damages in such suits. See *e.g.*, *Missouri Pac. R. Co.* v. *Harper*, 201 F. 671, and *Thompson* v. *Rouw Co.*, Tex. Civ. App. 1951, 237 S.W. 2d 662.

Mr. Chairman, the first paragraph of my statement deals with a question already put to prior witnesses, whether the courts have any power to award attorneys' fees in cases arising under section 20(11). Our research into the question convinces us that the manner in which the Interstate Commerce Act is written affords a court no power under which to award any attorneys' fees in any case arising under section 20(11) of the Interstate Commerce Act.

Mr. DINGELL. No power at all?

Mr. KOBER. No power whatsoever. I have cited some cases in my statement where that particular language of the act has been copiously analyzed by those particular courts which are cited in my statement.

The conclusion is clear, though, sir, that there is no power to award attorneys' fees in cases arising under section 20(11).

Mr. DINGELL. I note you cite two cases with regard to this point, but you cite one which is a Texas civil appeals case. It is not a Federal court.

Mr. KOBER. That is right, but that case did involve a determination under section 20(11) of the Interstate Commerce Act. The plaintiff has an alternative remedy. He can seek his remedy in Federal court, or in a State forum.

But to answer the chairman's specific questions put to earlier witnesses, there is no such power in cases arising under section 20(11) so that legislation before this committee, in fact, would not reinforce that which already exists, but would create a new right.

Provision for the award of attorneys' fees is not a novel concept under the Interstate Commerce Act. Sections 8 and 308(b) cover reparation awards for violations of the act by rail carriers and water carriers, respectively. Sections 16(a) and 308(e) provide for the judicial enforcement of reparation orders. Each of these sections provide specifically for the recovery of a reasonable counsel's fee by a successful plaintiff, which fee shall be awarded and collected as part of the costs in the case.

Perhaps the most convincing statutory argument for the amendment proposed in H.R. 9681 and companion bills and S. 1653 is to be found in section 20(12) of the act. A shipper or receiver by rail is given the option under section 20(11) of suing either the originating or delivering carrier for loss or damage in the movement of a particular shipment. The carrier selected for suit by the shipper or re-

ceiver may not have been responsible, in whole or in part, for the loss or damage sustained. Section 20(12) seeks to apportion responsibility for money damages awarded under section 20(11) among the various carriers participating in a particular movement.

The carrier selected for suit by the shipper or receiver may not have been responsible, in whole or in part, for the loss or damage sustained. Section 20(12) seeks to apportion responsibilty for money damages awarded under section 20(11) among the various carriers participating in a particular movement; and it provides:

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received or transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property.

Under sections 20(11) and 20(12) the following situation could easily result. A receiver of grain, failing to effect a reasonable settlement of his loss-in-transit claims, could sue the delivering rail carrier for the amount of the commodity lost in transit. A court could find for the plaintiff and award damages based only on the market value of the commodity shown to have been lost in transit. No award could be made to such plaintiff on the basis of his cost of litigation, including his counsel's fee. The defendant rail carrier, however, could claim against all other participants in the routing and movement of the particular shipment involved; and it could collect under section 20(12) not only the judicial award to the owners of the lost goods, but also the expense, including counsel's fee in defending the lawsuit. We sincerely feel that allowing recovery of reasonable counsel's fees to rail defendants in loss or damage actions, but precluding recovery of such expenses to successful plaintiffs in such actions, is not an equitable statutory arrangement. Enactment of H.R. 9681 would eliminate this inequity, and would afford owners of property shipped by rail the same measure of economic protection in prosecuting meritorious loss or damage actions as is provided rail carriers as defendants in such cases.

Allowance of reasonable expenses including attorneys' fees is also permitted to motor carrier and freight forwarder defendants in loss or damage actions under the terms of sections 219 and 413 of the act, respectively. In fact, these sections make the provisions of sections 20(11) and 20(12) specifically applicable to the resolution of loss and damage claims between owners of goods, on the one hand, and on the other, motor carriers and freight forwarders.

In at least one instance where a rail carrier might appear as a plaintiff in a claim action, the act provides that such plaintiff is entitled to the award of a reasonable attorney's fee. Section 15(9) deals with liability of rail carriers for their disregard without lawful cause of the routing specified in a bill of lading. The carrier or carriers disregarding such routing instructions shall be jointly and severally liable to the carrier deprived of its right to participate in the line-haul

movement, and "in any judgment which may be rendered, the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case." Of course, the important element here is the allowance of a reasonable attorney's fee to a successful plaintiff in a claim action brought under the provisions of section 15(9) of the act. The proposed legislation would secure an analogous right of recovery to a successful loss or damage claimant under section 20(11) to that provided rail claimants under sections 15(9) and 20(12) of the act.

Of necessity, our support of the instant bill is based on the exigencies of the grain trade. We are not unmindful, however, that the proposed legislation would affect all aspects of commercial transport that is made subject to section 20(11). Its application to freight of all kinds is fairly obvious. The problems that many consumers have had in the settlement of their claims with movers of household goods is a matter of wide documentation, the Interstate Commerce Commission having frequently noted the receipt of numerous such complaints in which it has no jurisdiction. S. 1653 would provide a better atmosphere in which the consumer could negotiate his claim with the mover of household goods. Presently the economic resources of each party is usually at a substantial imbalance, thereby precluding meaningful negotiation.

I might add at this point that there has been questions raised about the authority the ICC has with respect to the settlement of claims. There are two cases which I have cited in my memorandum in which the Commission will be called upon to make certain judgments regarding claim practices in general. However, the Commission, under the Interstate Commerce Act, has no power whatsoever to involve itself in the negotiation, the adjudication or the settlement of any particular claim matter in particular, although they may have some authority with respect to claim practices in general.

It might be suggested that the award of an attorney's fee be made discretionary in each case with the courts. In determining what may constitute a reasonable fee in each case, however, H.R. 9681 would charge the courts with the need to exercise discretion. The fee would, of necessity, be determined in light of all relevant circumstances that it might comply with the intended injunction that it be reasonable. The determinants would need to include the complexity of the issues raised, the quantum of damages actually awarded, and the relationship between the court award of damages and the amount offered by the carrier in settlement prior to trial of the action. As we construe the term "reasonable" in H.R. 9681, it could lead to a court to find in a particular case that no attorney's fee is justified despite plaintiffs having prevailed in the legal action. We recognize that the version of this legislation, S. 1653, provided specifically for discretion, and have no objection to such a qualification.

The proposed legislation would serve to fortify for the smaller shipper or receiver of freight the legal remedies already provided under section 20(11). These users are often without the financial resources to bring legal action on meritorious loss and damage claims because of the expense of litigation. Carriers are not unmindful of this situation, and their offers of settlement or failure to offer any settlement of such claims reflect this circumstance. To contend other-

wise would be tantamount to arguing untenably that carriers' claim managers and attorneys determine settlement offers in a vacuum and not on all relevant considerations. Providing for a reciprocal award of attorneys' fees dependent on which party prevailed would frustrate the intent underlying the proposed statute; that is, to afford the smaller shipper or receiver a practical and realistic opportunity to pursue the remedy embraced in section 20(11).

In its analysis of identical proposed legislation in the 90th Congress (S. 858), the Library of Congress Legislative Reference Service researched the question of reciprocity in relevant contexts. Their conclusion, based on a review of numerous Federal and State statutes providing for an award of attorneys' fees, is that:

> The unmistakable pattern that emerges from examination of the law, Federal and State, is to award attorneys' fees to the plaintiff, and then only if he prevails in his suit.

A further reason for rejecting reciprocity is related to the nature of the rates charged for line-haul freight service. The act requires that such rates be compensatory, and we interpret this to mean that the rates shall cover the cost of the principal elements of providing service. We refer to principal elements since we do not wish to become embroiled in the controversy of whether the proper measure of compensativeness is out-of-pocket costs or fully distributed costs, that is, whether one or the other is a proper measure of compensiveness. Even the lesser measure, however, must include general overhead or administrative expenses among which would be included the salaries of the carrier's claims attorneys and related costs. Thus, shippers are presently bearing the expense of carriers maintaining a claims staff in the rates that are paid for carriage. Reciprocity, therefore, would result in an unsuccessful plaintiff being required to pay, in effect, defendant's attorney fee twice since a portion of that expense had been allocated by the carrier-defendant in its rates.

I would like to add at this point that there has been a question raised about this aspect of self-insurance. If the rates are compensatory and if compensatory means that they must include all the elements of service, then it seems to me that every particular rate must include a factor based on historical data as to what the claim incidence would be with respect to the carriage of that traffic. Therefore, the premium for that self-insurance is already included as a part of the line-haul rates which every shipper is presently paying for the carriage of whatever commodity he chooses to ship, whether by rail, by truck, or by water carrier.

We recognize that a reciprocal provision for the award of reasonable attorneys' fees was added to section 222(b)(2) of the act by Public Law 89–170, the so-called anti-illegal carriage bill. We submit, however, that the relationship between the potential parties under section 222(b)(2) is quite different than the relative standing of the parties under section 20(11) of the act. Efforts to enjoin alleged unlawful carriage under section 222(b)(2) might be based on a malicious attempt by one carrier to suppress the rightful competition of another carrier. Thus, there exists the possibility of the misuse of the remedy afforded under section 222(b)(2) by one competitor for certain traffic against another; and the provision for the reciprocal award of counsels' fees may be a deterrent in such circumstances, although the legis-

lative history is silent on the precise intent in providing for reciprocity. Under section 20(11), however, the parties are not competitors; and there is no possibility that a suit arising thereunder could result in unlawful interference with a rail defendant's right to continue to compete in a particular market.

Finally, with respect to the denial of reciprocity, this committee is well aware of the widespread interest in consumer legislation and has considered many bills in this area. These bills provide attorneys' fees only for the prevailing plaintiff, but do not provide the safeguards contained in S. 1653.

Another frustrating limitation would be to require that an award of attorneys' fees may not exceed the amount of the judgment on the merits. Such a restriction could be used as a real weapon against the small claimant. The proposed statutory amendment is intended to foster an atmosphere which encourages and facilitates equitable settlements of loss and damage claims. If the award of a reasonable attorney's fee could not exceed the amount of the judgment, carriers would be encouraged instead to set a limit below which no settlement would be offered on the theory that it would be uneconomical for a claimant to file suit since his expenses would surpass his likely recovery—that is, the judgment plus a limited attorney's fee. In some respects, such a restrictive amendment would perpetuate the situation as it exists today under section 20(11) and frustrate the legislative proposal now before your subcommittee.

At this point, I should like to emphasize that the proposed legislation is not likely to lead to a multiplicity of doubtful actions. The proposed legislation would provide full economic relief only to those claimants whose causes of actions are meritorious. The unsuccessful plaintiff would not benefit as a result of the proposed legislation. Doubtful loss or damage claims would confront potential plaintiffs with the onus of unsuccessful prosecution and, thus, the full expense of those litigations. This prospect should control in large measure the filing of loss or damage suits. On the other hand, the statutory provision for the award of reasonable attorneys' fees to loss or damage claimants holding meritorious claims should insure an equitable offer of settlement, thereby reducing the necessity for suing for recovery for loss or damage. Furthermore, the 90-day cooling-off period amendment suggested by the Interstate Commerce Commission and accepted by the Senate should allow for reasonable settlements prior to any court action. This amendment is supported by our national association.

Our industry has viewed with growing alarm the establishment by several rail carriers of arbitrary bases for the settlement of grain and grain products claims. These policies and their ramifications are under investigation by the Interstate Commerce Commission in Ex Parte 263, Rules, Regulations, and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims and in Docket No. 35220, Practices and Policies in the Settlement of Loss and Damage Claims on Grain and Grain Products—Petition for Declaratory Order. Neither of these proceedings, however, are concerned with the issue underlying the instant legislation: to correct an imbalance in the process in which claims can be adjusted between a carrier, on the one hand, and on the other, a shipper or receiver of freight. Therefore, the ultimate disposition of these proceedings need

not concern us here for such disposition could not be a substitute for the legislation under consideration.

It is our view that S. 1653 is supported by any notion of elemental commercial equity and by the disposition of the attorney's fee issue in analogous circumstances under the Interstate Commerce Act. S. 1653 provides for recovery of reasonable fees, and the court would be able to exercise its judgment based upon the characteristics of each proceeding. This arrangement would reflect the same delegation of judicial discretion where the act presently provides for the award of reasonable attorneys' fees.

We can foresee no constitutional bar to the amendment proposed by S. 1653. We believe that the existent statutory scheme, relevant to the issue of the award of a reasonable counsel's fee, suggests beyond real question that the proposed legislation would meet all pertinent tests of constitutionality.

In conclusion, the National Grain and Feed Association and our affiliated State and regional associations strongly support S. 1653 and urge its early enactment.

Mr. DINGELL. Mr. Kuykendall?

Mr. KUYKENDALL. Let's say that a small rice elevator in Forest City, Ark., just across the river from my city, has a potential claim under this act if it were passed as written, and his attorney is an attorney there in the small town.

Who, in your opinion, would make the decision as to whether or not the case really would stand up in court, the owner of the elevator or his lawyer?

Who would make the prejudgment as to whether the case was worthy of taking to court?

Mr. KOBER. My experience would indicate that probably the attorney would make that judgment.

Mr. KUYKENDALL. And he would get paid either way. The question is not whether the attorney in Forest City gets paid, but who pays him, is that correct?

Mr. KOBER. I don't think that is the issue.

Mr. KUYKENDALL. Let's answer my question. The attorney would get paid either by the owner of the elevator or the carrier?

Mr. KOBER. That would depend whether the attorney were on a retainer basis.

Mr. KUYKENDALL. Let's say the smalltown elevator is not big enough to have an attorney on a retainer. I am not worried about the bigger companies that have several attorneys retained.

Let's look at the little guy who has to hire an attorney to do his work for him.

Mr. KOBER. I would agree with the proposition that if an attorney renders services, he expects to get paid for it.

Mr. KUYKENDALL. That is right, and based on that, I don't buy the idea that there wouldn't be more lawsuits. You say he doesn't get paid, leaving the question of whether the elevator operator has to pay it, or whether the carrier has to pay it, but the man who usually makes the decision of whether or not to go to court is going to get paid one way or the other.

Mr. KOBER. Yes, but before the small elevator operator goes to court, he has to make an economic judgment as to whether the added expense of litigation would be bearable. We are talking about a fee for mere

advice and then the fee for advice and the fee for the prosecution of the case in a particular court, which would be a judgment which the elevator operator may decide.

Mr. KUYKENDALL. You agree in every case that the elevator operator has to gamble, is that correct?

Mr. KOBER. No, I don't think that judgment amounts to a gamble.

Mr. KUYKENDALL. He has to gamble when he tells his lawyer whether to go to court or not. I don't know of any sure thing courts, do you? He is gambling when he goes to court, is he not?

Mr. KOBER. He is relying on the advice of his attorney, which I hope is more than a mere gamble.

Mr. KUYKENDALL. You get me an attorney whose advice in court isn't a gamble, and I will hire him right now and keep him the rest of my life.

Are you a sure thing attorney?

Mr. KOBER. I have never seen any open and shut cases.

Mr. KUYKENDALL. This then is a gamble. Let's get it over with. It is semantics here, but when it is not a sure thing, it is a gamble.

If you want me to change the phrasing and say, "You are taking a chance," I would say that.

But we are taking a chance, and I don't like the idea of the elevator operator or anybody else thinking that because we pass a bill like this, he has a panacea on his hands, because he hasn't, and we want to do something in this case, grain particularly.

Do you know what the first case that the ICC ever considered in its history was? Freight car problems. It was 1884, I believe.

What would be in the normal shrinkage?

Mr. FRAZIER. One-eighth of 1 percent. That is what the carrier is allowed. If he loses that amount, he pays nothing.

Mr. KOBER. That is the allowance presently provided.

Mr. KUYKENDALL. Is that adequate? Is one-eighth of 1 percent perfectly normal?

Mr. FRAZIER. The one-eighth of 1 percent came about as a result of a very exhaustive study that was made years ago.

Mr. KOBER. By the ICC. There is no reason to believe that it is inadequate. As a matter of fact, the practices of handling grain have improved, and the one-eighth of 1 percent may actually overstate the shrinkage.

Mr. KUYKENDALL. So you are not going to argue on that point of one-eighth of 1 percent?

Mr. KOBER. That is correct.

Mr. KUYKENDALL. We turn up here because of the paper door and the hole in the floor; we come up here with a 5-percent loss, say. That would be serious, wouldn't it?

Mr. FRAZIER. Yes; it would be.

Mr. KUYKENDALL. What is the normal procedure for handling a 5-percent loss in a shipment between Bismarck and Chicago?

Mr. KOBER. It is a simple procedure. The person who bears the onus of that loss would file a claim with either the originating carrier or the destination carrier setting forth the amount that was lost and the market value of the grain that was lost, with supporting documents, obviously.

Mr. KUYKENDALL. Would that be a 100,000-pound car, or Big Johns?

Mr. FRAZIER. Big Johns are much larger.

Mr. KUYKENDALL. Say 5,000 pounds of grain?

Mr. KOBER. Yes; at a 5-percent loss. You would deduct from that one-eighth of 1 percent.

Mr. KUYKENDALL. Under present practices, is the carrier awarded a kind of automatic reason for losing grain that he is not responsible for? Is there such a thing as a situation beyond his control, is there any such thing that he is automatically not responsible for?

Mr. KOBER. Section 20(11) provides certain circumstances that are not within the control, acts of God, public enemies, and so on.

Mr. KUYKENDALL. Public enemies. So really it would be pretty much an act of God?

Mr. KOBER. Yes; pretty much.

Mr. KUYKENDALL. An act of God, is there generally insurance on that?

Mr. FRAZIER. Yes, sir.

Mr. KUYKENDALL. Who would have to buy it?

Mr. FRAZIER. The shipper.

Mr. KUYKENDALL. Do you normally buy it?

Mr. KOBER. No.

Mr. FRAZIER. Some shippers do. Mr. Kober's firm apparently does not. The firm I used to be with did.

Mr. KOBER. Our responsibility before section 20(11) makes it our responsibility.

Mr. KUYKENDALL. You would have no argument with that?

Mr. KOBER. Of course not.

Mr. KUYKENDALL. So, other than an act of God, the carrier in your eyes and in the eyes of the ICC is totally responsible to deliver 99⅞ percent of that grain?

Mr. KOBER. That is correct. I would not say "in the eyes of the ICC," but in the eyes of section 20(11) of the Interstate Commerce Act.

Mr. KUYKENDALL. Yes. I would assume that should be their bible, the Interstate Commerce Act.

Generally speaking in your grain industry, and your industry is one that is really on our minds, believe me, in your industry what is the average size of a claim, percentage-wise?

Mr. KOBER. As a percentage of the total shipments in an average boxcar?

Mr. KUYKENDALL. No, what is the average size of your average claim?

Mr. KOBER. My experience would indicate that the size of the average claim is somewhere between $50 and $75 per claim per car.

Mr. KUYKENDALL. What percent is that of the tonnage that is in the car?

Mr. KOBER. Mr. Frazier indicates that the value of the average carload of grain might be estimated to be about $2,000, and you can figure——

Mr. FRAZIER. That is a boxcar.

Mr. KOBER. That is a boxcar, of course, and we are only talking about boxcars in this particular connection.

Mr. KUYKENDALL. I am trying to get an idea of what they lose with the holes in their cars. Would 1 percent be a big claim?

Mr. FRAZIER. No.

Mr. KOBER. No.

Mr. KUYKENDALL. Is that fairly common?

Mr. FRAZIER. I would say the claims in the way we are talking now are probably 2.5 percent average.

Mr. KUYKENDALL. That is 2,500 pounds out of 100,000.

Mr. FRAZIER. It is difficult to give you an average value.

Mr. KUYKENDALL. Instead of "average," say "typical."

Mr. FRAZIER. We will say 2.5 percent as an average.

Mr. KUYKENDALL. What is your average settlement, do you know that?

Mr. FRAZIER. Lately, it is very low.

Mr. KUYKENDALL. We don't know what "low" is.

Mr. FRAZIER. Mr. Kuykendall, I would like to say something. Your idea and the way we used to handle claims are very, very close. In days before 1966, let's take a terminal elevator operation that unloaded perhaps 100 cars a day. Following the procedures that we outlined, the shipping weights and the receiving weights were put together, a large stack of 15 or 30 days of terminal operations were put together. The claim agent from the railroad came in and sat down, and went over the individual claims.

Mr. KUYKENDALL. The stock of them?

Mr. FRAZIER. Yes. He went over some of them quickly with a representative of the company.

Mr. KUYKENDALL. How quick did that happen, once a month, or twice a month?

Mr. FRAZIER. About once a month.

Mr. KUYKENDALL. That was pretty good service.

Mr. FRAZIER. Yes, and we were happy with it. Within 2 or 3 hours the claim agent would throw out certain claims, saying: "That fellow has a history that is not good and we won't pay you anything," and he would have a stack here of $15 claims, and they wouldn't be bothered with that.

On the other claims, you came to a settlement, and it took an hour or two. That was always under the idea of giving the railroad the one-eighth of 1 percent tolerance.

This was a very equitable manner, and in almost no case did any claim ever go to court.

Then back in April of 1966 when the arbitrary claim settlement basis was put in, whereby the railroads——

Mr. KUYKENDALL. What do you think motivated this, their financial condition?

Mr. FRAZIER. I think the railroads looked at—I am an outsider, and I have no inside information—I think they looked at the costs of their claims staffs and their costs of claims and figured they could run these things through on a computer on a 50, 75, or 100 percent no-payment basis and save $10 million a year, and they put it in.

Mr. KOBER. Of course, eliminating the need to investigate each individual claim is part of this revised procedure of settling claims.

Mr. KUYKENDALL. This is something that the more I look into it, the more I am convinced of two things: That something should be done, and that this bill isn't it.

I see no answer except for maybe a streamlined reinstallation of the system that worked so well for so long.

Mr. FRAZIER. There is no way to force that, except court.

Mr. KUYKENDALL. We can pass a law, can't we?

Mr. FRAZIER. Yes, sir; and I think we will be dead and buried.

Mr. KUYKENDALL. I think we are more likely to go in that direction than this one.

Mr. FRAZIER. We think this will give especially the small shipper, and I have bought beans from Forest City, Ark., and shipped them to Memphis, and I would say that the fellow I bought them from might make a mistake going to court the first time, but he wouldn't make it the second time.

Mr. KOBER. What we are really hoping to achieve by the legislation before the committee at the present moment is that this legislation, once passed, will provide the incentive for the carriers to do two things: to return to the former method of settling claims, and, two, it might offer them some incentive to upgrade their shoddy boxcars which they offer to us, from which the grain seems to leak out.

Mr. KUYKENDALL. You give us incentive on the boxcar situation and you will be the hero of the ages with all of us.

I have no further questions, Mr. Chairman.

Mr. DINGELL. Thank you very much.

Gentlemen, we thank you for your very helpful testimony this morning. Mr. Kober, we are going to particularly review your comments with regard to attorneys' fees.

Mr. KOBER. Thank you, Mr. Chairman.

Mr. DINGELL. The next witness is Mr. Durward Seals, traffic manager, United Fresh Fruit and Vegetable Association.

The Chair observes we will probably have a quorum call in the next few minutes.

STATEMENT OF DURWARD SEALS, TRAFFIC MANAGER, UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION; ALSO IN BEHALF OF GROWERS AND SHIPPERS LEAGUE OF FLORIDA, AND FLORIDA FRUIT AND VEGETABLE ASSOCIATION

Mr. SEALS. My name is Durward Seals. I am traffic manager of the United Fresh Fruit and Vegetable Association. This is a national trade association, with the headquarters at 777 14th Street NW., Washington, D.C., having nearly 2,600 members, residing in nearly all of the States, who are engaged in growing, packing, shipping, and distributing fresh fruits and vegetables, as well as providing goods and services to the industry. In the aggregate, they handle approximately 75 percent of the Nation's tonnage of fresh fruits and vegetables.

I am appearing also for the Growers and Shippers League of Florida and the Florida Fruit and Vegetable Association.

The Growers and Shippers League of Florida, Post Office Box 15219, Orlando, Fla., is a voluntary, incorporated, nonprofit organization of growers and shippers of citrus fruits and vegetables and citrus processing plants in and from Florida.

The Florida Fruit and Vegetable Association, Post Office Box 20155, Orlando, Fla., represents producers of vegetables, sugar cane, citrus and tropical fruits from virtually all major agricultural areas of the State of Florida.

Mr. Chairman, I am appearing today in support of H.R. 9681 which would amend section 20(11) of the Interstate Commerce Act by the addition of the following paragraph:

PROPOSED AMENDMENT TO H.R. 9681

And provided further, That if the plaintiff shall finally prevail in any action, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit.

S. 1653, as introduced in the Senate on March 24, 1969, by Senator Warren G. Magnuson, chairman of the Senate Committee on Commerce, for himself and Senators Hart and Hartke, contained the same language. However, the bill as amended and reported by the Committee on Commerce on December 22, 1969, and as passed by the Senate by unanimous consent on January 26, 1970, contained the following language:

That the court, in its discretion, may allow a reasonable attorney's fee to the plaintiff in any successful action, to be taxed and collected as part of the suit, but no such fees shall be allowed to the plaintiff except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and that such claim has not been paid within ninety days after receipt of the claim by the carrier or its agent.

We are in agreement with and support the present language of S. 1653 and respectfully suggest a similar amendment to H.R. 9681. We might point out that the language of H.R. 17367 introduced by Representative Jarman on April 30, 1970, contains the same language as the Senate-passed bill.

At its annual convention in February 1969, our association endorsed this legislation and urged the rail carriers to resume dependable rail service for the transportation of our highly perishable products. The resolution reads as follows:

At our 64th annual meeting in San Francisco a year ago, we stated in detail the deplorable situation which had then developed with regard to deliveries by rail of our perishable products, especially to our Eastern markets. It scarcely seemed possible that the situation could now be worse, but it is. The gluts and famines of fresh fruits and vegetables continue, and producers and distributors have been critically injured as a result of the lack of dependability of rail deliveries. How much longer must we wait for the reestablishment of dependable rail transportation, at least equal to that level of dependability which prevailed prior to June 1, 1964, when the Eastern railroads cancelled their established guaranteed schedules?

Our industry's meetings with Eastern railroad officials generally have been productive of nothing but promises; results are not apparent. Shortages of our industry's products caused by the failure of transportation agencies to deliver merchandise as scheduled continue. Producers are deprived of one or more days of consumer purchases, and housewives continue to be disappointed far too often with bare display counters when they had planned to avail themselves of advertised specials. Again we ask, how much longer must we wait for action?

We respectfully request that now the high office of the President of the United States become acquainted with the exceedingly low level of dependability of deliveries of our essential, perishable foods, and that the Secretary of Transportation should take immediate and vigorous steps to investigate the failure of the railroads to provide timely deliveries consistent with their published or announced schedules, and their refusal to provide adequate information with respect to delays.

And again, we ask enactment of legislation which will amend the Interstate Commerce Act in order to provide recovery by successful claimants of reasonable attorney's fees incident to litigation to enforce the carrier's obligation for loss and damage in transit.

In furtherance of this resolution, I am offering this statement in support of H.R. 9681.

For many years the American railroads, including the eastern carriers, maintained so-called guaranteed schedules from various producing areas in the Southwest and the West to the principal produce markets. Claims for delay to shipments of fresh fruits and vegetables were paid on the basis of a guaranteed schedule. Some railroads published their guaranteed schedules, and others while not publishing the schedules, paid claims on the basis of schedules quoted in their solicitation of traffic.

On April 30, 1964, the principal eastern railroads announced that on and after 12:01 a.m. on June 1, 1964, they would—

> Not undertake to deliver at destination at or within any particular time or in time for any particular market or otherwise than with reasonable dispatch.

The fresh fruit and vegetable industry, including this association, vigorously opposed the cancellation of these guaranteed schedules. Despite numerous conferences with eastern railroad officials, the rail carriers refused to rescind their order, and the schedules were canceled on June 1, 1964. Since that time service and delivery performances at many of the eastern markets, particularly those located east of Buffalo, N.Y., have deteriorated and it has been extremely difficult to provide for the orderly marketing of highly perishable fresh fruits and vegetables in this area or to collect claims for delays from the eastern carriers.

Although the United and other representatives of the fresh fruit and vegetable industry have held numerous meetings with the eastern carriers, to date they have remained adamant in their position that they will not guarantee schedules, except on certain traffic to specified destinations, and that they will not pay claims unless negligence is proven by the shipper or receiver. Except in unusual circumstances, the shipper or receiver rarely has knowledge of what occurs to a particular shipment in transit. Therefore, he would find it difficult, if not impossible, to prove that the carrier was negligent. Moreover, there is no justification in the position of the eastern carriers in attempting to force the claimants to prove carrier negligence.

The law requires that lading be transported with reasonable dispatch. For over 30 years the rail carriers have accepted their operating schedules as a standard of delivery performance and have paid valid delay claims if they failed to adhere to these schedules. This policy still is being followed by most rail carriers. The eastern carriers, however, seem determined to continue their policy of refusing to accept responsibility for transit delays unless the receiver or shipper, with no knowledge of transportation failures in transit or access to carrier's transit records, can prove to them that the delay was negligently caused. If the eastern carriers continue to refuse to pay these claims for delay, then it will be necessary for the claimant to seek relief in the courts. This legislation would aid the claimant in recouping a portion of his total litigation costs.

There is ample precedent in the Interstate Commerce Act for providing a reasonable attorney's fee to shippers or receivers where they successfully maintain an action. A favorable ruling by the Assistant Comptroller General of the United States with respect to S. 858, an identical bill to H.R. 9681, is quoted below:

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., February 24, 1967.

B-120670.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We refer to your letter of February 14, 1967, asking for our comments on S. 858.

The bill would amend paragraph 11 of section 20 of the Interstate Commerce Act, 49 U.S.C. 20(11), to provide for recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in the transportation of property in interstate commerce. Similar proposals were made in S. 3741, 89th Congress, second session; S. 1606, 88th Congress, first session; S. 2963, 87th Congress, second session, S. 3820, 85th Congress, second session; and S. 2418, 84th Congress, first session.

Sections 8 and 16(2) of the Interstate Commerce Act, 49 U.S.C. 8, 16(2), now permit the recovery of a reasonable attorney's fee by successful plaintiffs in certain kinds of actions arising under part I of the act. See, also, 49 U.S.C. 908(b) and (e), pertaining to recovery of an attorney's fee in actions against common carriers by water. And see 49 U.S.C. 322(b)(2), pertaining to motor carriers, and 49 U.S.C. 1017(b)(2), pertaining to freight forwarders, where the allowance of attorney's fees in certain kinds of actions is confided to the discretion of the court.

The question whether a successful plaintiff, suing to recover the value of property lost or damaged in transit, is entitled to recover also a reasonable attorney's fee seems to be one primarily of policy for resolution by the Congress. See, for example, the case of Thompson v. H. Rouw Co., Tex. Civ. App. 1951, 237 S.W. 2d 662, holding that the measures of damages adopted by the Congress is the present enactment as section 20(11) does not permit allowance of attorney's fees.

It would seem, however, that such allowance would be equitable in those instances where a carrier fails or refuses to settle a just claim and the property owner is forced to exercise his judicial remedy. Such allowance also is in harmony with the other provisions of the act and with court decisions permitting recovery of an attorney's fee in other kinds of actions. See, for example, the case of Strickland Transp. Co. v. Harwood Trucking, Inc., Mo. App. 1961, 348 S.W. 2d 581, where, in an action by one carrier against another under section 20(12) of the act, to resolve liability for the loss of part of an interstate shipment, the court permitted recovery of a reasonable attorney's fee.

We believe the amendment is equitable and we offer no objection to favorable consideration of S. 858 by our committee.

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General of the United States.

We call your attention to that portion of the above ruling of the Assistant Comptroller General, in favorably commenting on S. 858, wherein he said: "Such allowance also is in harmony with the other provisions of the act and with court decisions permitting recovery of an attorney's fee in other kinds of actions."

Section 8, part 1, of the Interstate Commerce Act permits recovery of a reasonable attorney's fee in an action for damage sustained as a result of a violation of the provisions of part 1 of the act by a common carrier. The attorney's fee is to be taxed and collected as a part of the costs in the case.

Section 16(2), part 1, of the Interstate Commerce Act permits recovery of a reasonable attorney's fee in an action brought to enforce an order of the Commission for payment of money. The fee to be taxed and collected as a part of the costs in the suit.

I draw the attention of the subcommittee particularly to section 20 (12), part 1, of the Interstate Commerce Act which provides:

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose common carrier, railroad or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, *and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property.* (Emphasis added.)

Under this section the initial or delivery carrier can recover from an intermediate or connecting carrier, on whose line the loss, damage or injury occurred, not only the amount of the loss, damage or injury, but also the amount of any expense reasonably incurred by the initial or delivering line in defending any action at law brought by the owners of the property. We believe similar protection should be extended to the users of transportation—the carrier's customers. The enactment of this legislation would be of great assistance to shippers and receivers in the collection of valid claims for delay.

The opponents of H.R. 9681 probably will argue that the passage of this bill will encourage unnecessary and unjustifiable litigation. We do not agree. The average claim for delay on a carlot shipment of fresh fruits and vegetables is about $300. Generally, to litigate such a claim requires 2 or 3 days pretrial preparation on the part of the attorney and 2 or 3 days of actual trial. In addition to this, the claimant and some of his key personnel are likewise required to spend a like amount of time in preparation and trial. Even if he is able to recover a reasonable attorney's fee in the ultimate settlement, the claimant is not likely to incur this additional expense unless he has a valid claim. On the contrary, we believe the passage of H.R. 9681 will have a salutary effect on the claim departments of the carriers, and will stimulate their efforts to seek an amicable settlement of claims that otherwise would be litigated.

The question has been raised as to whether the granting of attorney's fees should be on a reciprocal basis so that if carriers were successful, they would also be granted attorneys' fees. While we strongly support this legislation in its present form, we would be opposed to granting attorneys' fees to railroads. We feel that such a change would be out of harmony with the broad remedial purposes of the Carmack Act and its amendments (49 U.S.C. 20(11)), would overlook the carrier abuses which gave rise to the introduction of this legislation, and might compound the shippers' difficulties by placing in the hands of some carriers, a weapon which they do not require and which they might use for oppressive purposes.

Among the reasons why no reciprocal fees are required by the railroads are:

1. Fees to the shipper are required to remedy carrier abuses and arbitrary carrier conduct which have visited hardship upon members of the shipping public throughout the country.

2. No reciprocal abuses have been shown by shippers nor has it been shown that the carriers are in need of some additional reciprocal protection. Section 20(11) would appear to mandate the payment by the carrier of the shipper's full loss. It provides that the carrier "shall be liable for any loss, damage, or injury caused by it and no contract, receipt, rule, regulation, or limitation of any character whatsoever

shall exempt such common carrier, railroad, or transportation company from the liability imposed." It provides specifically for liability "for the full, actual loss, damage or injury." However, if the carrier refuses to recognize this liability and arbitrarily refuses to make payment or to deal justly with the claim, at present the statutes impose no sanction. Where, on the other hand, the shipper seeks to collect an unjust claim, the carrier is adequately protected by the sanctions of the Elkins Act (49 U.S.C., ss. 41), which makes unlawful, unjust claims. Further, as I have stated before, where the carrier, arbitrarily or otherwise, defends against a claim and loses the lawsuit (under sec. 20(12)), it can recover against the other participating carrier in the line-haul not only their proportion of the recovery by the plaintiff, but also the legal fees and the expenses of defending.

3. In claims litigation the parties do not stand on an equal footing:

(*a*) The carrier is in possession of the records of transportation and is, or should be, aware of its own conduct which gives rise to the claim. The shipper, on the other hand, is not, and in normal cases cannot be aware of these facts.

(*b*) The carrier is normally defended by counsel who are usually members of its own legal staff and who are expert in transportation matters. Its employee witnesses normally travel by railroad pass and are usually available at the carrier's pleasure. Shippers, on the other hand, must rely on independent attorneys who are not payroll employees. Witnesses must be sought from distant points from consignees or other persons having a more or less tenuous association with the transaction. These witnesses, if brought to the trial, do not travel by railroad pass and are not as readily available to the plaintiff.

(*c*) To prevail in litigation the plaintiff must affirmatively establish his cause of action by a preponderance of the evidence. However, he may lose for many reasons, even though he has a just claim. The death or unavailability of a material witness, the absence of an essential document or failure to prove an essential fact, a mistake in his remedy, a suit in the wrong forum, and many other factors may result in the nonsuccess of the plaintiff.

(*d*) The carrier need do nothing until the plaintiff has affirmatively met his burden of proof in the case. It can then, as it often does, make a settlement "on the courthouse steps." The shipper, having gone to the expense of preparing has no alternative but to then accept a payment which is noncompensatory and does not, in any event, compensate him for the loss of time of himself, his witnesses, and the other expenses incurred. This legislation would not, in any event, compensate a shipper for the expense of preparing for trial, the loss of time of key employees, and other similar costs. It is only designed to deal with one aspect of that litigation; that is, a reasonable attorney's fee, and that only if the plaintiff wins.

4. The Carmack Act, the Hepburn amendment, and the various amendments to section 20(11) are remedial legislation intended to aid the shipping public and to help redress the economic and legal disadvantage of the public in dealing with the railroads to dispose of claims in their claim departments. The need for the amendment sought now (H.R. 9681) arises from the arbitrary action by the carriers. Since the necessity for this legislation arises from the conduct of the carriers, it does not seem appropriate that in dealing with the

problem created by them that Congress should grant to them reciprocal rights or fees. The granting of legal fees to a carrier who succeeded in defeating a claimant in court would, on the other hand, be a retrogressive step and could in some instances be an oppressive weapon in the hands of the party to the litigation with the greatest economic power.

The Library of Congress, Legislative Reference Service, researched the question of reciprocity in its analysis of S. 858, identical proposed legislation in the 90th Congress, and their conclusion, based on the review of numerous Federal and State statutes providing for an award of attorneys' fees, was that:

> **The unmistakable pattern that emerges from examination of the law, Federal and State, is to award attorneys' fees to the plaintiff, and then only if he prevails in his suit.**

We are familiar with the proceeding instituted by the Interstate Commerce Commission on January 29, 1970, and identified as ex parte No. 263, rules, regulations, and practices of regulated carriers with respect to the processing of loss and damage claims. This proceeding was instituted by the Commission, on its own motion, following the filing of a joint petition by the Northwest Furniture Manufacturers Association and the Washington-Oregon Shippers Cooperative Association, Inc., in Docket No. 35198, jurisdiction over concealed loss and damage claims, rules, regulations, and practices of regulated carriers; petition for declaratory order, requesting the entry of a declaratory order to terminate a controversy; and remove uncertainty in regard to the lawfulness of rules, regulations, and practices recently adopted by railroads, motor carriers, and freight forwarders subject to parts I, II, and IV of the Interstate Commerce Act, with respect to the handling, processing, and limitation of carrier liability in the case of concealed loss and damage claims filed by shippers and receivers of freight. By Commission order, the record in No. 35198 was made a part of ex parte No. 263 and, at the same time, the Commission extended its order to cover all aspects of the regulated carriers' rules, regulations, and practices governing and affecting the handling and processing of loss and damage claims, concealed and otherwise.

This proceeding, however, no matter what its outcome, will not obviate the necessity for this legislation. In the first place, it is an exploratory type of proceeding which will require many months for a final determination. Secondly, the Commission does not have jurisdiction over loss and damage claim matters and has always held that these are for the courts to decide.

Most importantly, however, the subject matter of the proceeding is significantly different from the subject matter of the bill. The proceeding deals with relief for shippers or receivers who incur legal costs because of arbitrary actions on the part of carriers in refusing to recognize legitimate claims.

No matter what rules or practices are prescribed or followed, no relief for arbitrary carrier action in failing to voluntarily pay valid claims will be afforded except as provided in H.R. 9681. The Commission itself has stated its support of S. 1653 and the need for this type of legislation to facilitate the collection of valid loss and damage claims.

The arbitrary and adamant position of the Eastern carriers in the settlement of claims falls heavily on the small shipper and receiver who cannot afford to litigate his claims because it is economically not feasible to do so. The passage of this legislation would provide a measure of relief and would reduce the necessity for litigation.

We support the bill, and hope this committee will approve it.

Thank you, Mr. Chairman.

Mr. DINGELL. We thank you very much for your very helpful testimony, Mr. Seals. The committee is grateful to you for your presence this morning.

Mr. SEALS. Thank you.

Mr. DINGELL. Our next witness is Mr. T. Vernon Hansen, National Council of Farmer Cooperatives and Southern States Cooperative, Inc., who is accompanied by Mr. Donald E. Graham.

The Chair recognizes you for such statement as you wish to give, and will you please give your full names and addresses to our reporter for purposes of the record.

STATEMENT OF T. VERNON HANSEN, NATIONAL COUNCIL OF FARMER COOPERATIVES, AND GENERAL TRAFFIC MANAGER, SOUTHERN STATES COOPERATIVE, INC.; ACCOMPANIED BY DONALD E. GRAHAM, ASSISTANT GENERAL COUNSEL, NATIONAL COUNCIL OF FARMER COOPERATIVES

Mr. HANSEN. My name is T. Vernon Hansen. I am general traffic manager of Southern States Cooperative, Inc., and my office is located at 2101 East Fort Avenue, Baltimore, Md. I appreciate the opportunity to appear here today on behalf of the National Council of Farmer Cooperatives as well as on behalf of my employer, Southern States Cooperative, Inc., which is a member of the national council. Both of these organizations urge passage of S. 1653.

Accompanying me is Mr. Donald E. Graham, assistant general counsel. His offices are at 1129 20th Street NW., in Washington, D.C. Mr. Graham will discuss the legal aspects and respond to legal questions raised now and by previous witnesses.

The National Council of Farmer Cooperatives represents approximately 5,700 of the marketing and purchasing cooperative associations through its members who serve approximately 3,000,000 farmer memberships in all parts of the country. The members of the national council handle nearly every type of food and fiber marketed commercially in the United States and use every form of transportation in distributing their products. The annual freight bill of the members is in the hundreds of millions of dollars.

Southern States, my employer, is a regional agricultural cooperative association organized and operating under the "Agricultural Cooperative Association Act" of Virginia. It engages principally in cooperative purchasing and manufacturing, but also performs some cooperative marketing functions. This organization operates primarily in the States of Delaware, Maryland, Virginia, West Virginia, and Kentucky. Southern States and its affiliated cooperatives had a combined membership of 225,081 agricultural producers as of June 30, 1970. Its principal office is in Richmond, Va.

My entire career has been in transportation—the last 15 years have been with my present employer as general traffic manager. Part of my responsibility involves the collection of loss and damage claims against the various transportation companies of all modes. In recent years this has become increasingly difficult.

Southern States operates 13 feed mills some of them wholly owned and others under management contracts with sister cooperatives. It also operates seven wholly owned fertilizer plants and eight farm supply warehouses. We ship and receive approximately 45,000 carloads each year by the various railroads in the United States. In addition thereto we make extensive use of motor common carrier transportation. Southern States also uses barge transportation to some extent, receiving shipments of grain and grain products, used in its feed-mixing activities. Our greatest problem in claim settlements is in carload shipments of bulk grain and other feed ingredients. We also sustain significant losses due to damage of such articles as electrical appliances, paint, barbed wire fencing, and other farm supplies which move by both modes of land transportation for our farmer members.

A major part of our claim problem is that most boxcars furnished to transport bulk materials are unsuitable and unfit for these commodities. One specific defect in boxcars that causes much of our loss is that the inner liners do not extend all the way to the ceiling of the car. When feed ingredients, such as flour mill byproducts or soybean meal, are blown into a car, much of the material gets behind this lining. Because of the possibility of contamination, we dare not rip off the bottom boards of this lining to unload the material trapped behind the lining. At one of our feed mills a railroad was conducting a contract salvage operation to recover material lodged behind liners. The contractor performing this work estimated that he salvaged an average of 600 pounds of material per car, with some cars running as high as 2,000 pounds of material trapped behind the lining.

I would like to interpolate here, if I may. I have a letter here from the manager of that particular mill, where he says the man doing the contract salvaging was paying the railroad $350 a month for the feed he salvaged and then, of course, resold, and it is the identical cars on which the railroads were receiving the salvage money, and on which they refused to pay our claims.

Other defects in cars are holes in floors and outer wall, doorposts so deteriorated that they will not hold nailed grain doors. Many cars have leaky roofs and sidewalls where moisture can enter and cause deterioration of the lading. When claims are filed for the value of this lost or damaged material they are declined by the railroads. On obviously defective cars which have holes in the floors and sidewalls we are sometimes offered compromise settlements of 25 to 50 percent of the loss. Inasmuch as the amounts of the individual claims are small, ranging from several dollars to several hundred dollars per car, it is economically unfeasible to institute a lawsuit as the cost of the attorney's fee for prosecuting the action would in many cases exceed the amount of the claim.

I would recommend, and would like to offer for your review, Mr. Chairman, some photographs we have taken here of what the insides of boxcars look like, and this condition exists, I would say, in 70 to 75 percent of all the cars we receive.

Mr. DINGELL. The committee would be happy to look at those pictures, and will instruct the staff to review them with regard to the appropriateness of including them in the record. Please give them to our staff member.

(The photographs referred to may be found in the committee's files.)

Mr. HANSEN. Thank you, Mr. Chairman.

This adding machine tape shows a long list of claims for a total of 5,450-something dollars. This indicates the impossibility of attempting to file a suit on claims of this size.

We also experience severe financial loss due to delays. If a carload of mixed feed or fertilizer consigned to one of our small agencies is unduly delayed, it is often necessary to rush a truckload to an agency to hold it over until the delayed car arrives. This is usually done at a high premium. Carriers just refuse to entertain claims for damages of this nature. We feel we are entitled to recover our cost due to unreasonable railroad delay; however, here again the cost of legal services usually makes such procedure uneconomical.

I have instances here that I would like to read into the record, claims falling into the special claims category.

Mr. DINGELL. Without objection, so ordered. You may proceed.

Mr. HANSEN. On December 7, 1968, we shipped a car of corn from Delaware, on the Eastern Shore, to Brooklyn, N.Y. Our tracing indicated that it went to Harrisburg as an empty car, and then back to the origin point and finally arrived in the New York area on December 17. It was floated across to Brooklyn on December 22 and reached the consignee on December 26, 15 days after it was shipped from Delaware to New York City.

It was declined by him on December 27 because the corn was out of condition.

On Monday, December 30, I notified the railroad that we were abandoning the car. But later on, we relented and offered to dispose of the car for the railroad, because we had better avenues to do so than the railroad company would have.

Due to further delays, we sold the car to a distillery and the car was finally forwarded from New York to Philadelphia on January 7.

Prior to the time I agreed to sell this car for the railroad, I telephoned the claim department of this carrier and mentioned the situation to them, and they assured me that they would consider a special damage claim in this category.

Eventually the shipment reached the distillery, and the grade went from, I believe, a 2 grade at origin to a 5 grade at Philadelphia. This caused considerable discount in price.

Insofar as the freight was concerned from Brooklyn back to Philadelphia, it was on a collect basis, and the receiver paid it and deducted that from our invoice. So we had freight, loss of quality, freight to the new customer, and all this because we tried to help the railroad out, and they absolutely refused to pay a claim, because they considered it a special situation.

We have had any number of situations like that where a car is delayed to a small agency, and they just don't have warehouse space to buy too far ahead, or money, and a car will be delayed for a week or 10 days.

We must ship them a truckload of feed at a premium from another location, and these costs are absolutely impossible to recover on a claim basis because railroads just say, and I can quote from a letter where we had one such situation:

> This claim will definitely come under the category of special damages that are not within contemplation of the parties of the bill of lading contract and consequently we must of necessity reaffirm our original declination.

Now, the bill of lading contract does call for shipments to be handled on no special schedule, but must be handled with "reasonable dispatch," and in some cases we have had claims where they agree that they have delayed the cars, but they deny the claim on the basis of "reasonable dispatch."

I might point out also, in connection with the poor boxcar equipment we get, that there is statutory obligation imposed on the railroads in part I of the Interstate Commerce Act, and my statement on page 4 gives you several citations.

The railroads have a statutory obligation to furnish suitable cars for shipments tendered them by shippers located on their lines. This obligation is imposed on railroads by part I of the Interstate Commerce Act. The Interstate Commerce Commission has in numerous cases ruled that it is not only the obligation of the carrier to furnish cars, but the cars furnished must be fit and suitable for the lading which they are intended to carry:

> It is the duty of carriers to furnish cars suitable to transport in safety traffic which they hold themselves out to carry (*Sioux City Term. Ry. Switching*, 241 ICC 53, 66-67).

Citing 14 ICC 154; 34 ICC 60; 43 ICC 276; 51 ICC 475; 78 ICC 732 and 85 ICC 545:

> At common law it was the primary duty of common carriers to furnish vehicles suitable in every respect for the safe transportation of the various kinds of property usually carried by them. They have not been relieved of this duty by statute. Paragraphs (10) and (11) of Sec. 1 of the Act provide that it shall be the duty of every interstate carrier by railroad to furnish safe and adequate car service, including special types of equipment (*Archer-Daniels-Midland Co. v. Alton R. R.*, 246 ICC 421, 426).

The present deplorable condition of the boxcar fleet in the United States becomes apparent upon reading recent studies made by the Department of Agriculture. Marketing and Research Report No. 766, dated August 1966, indicates that of the 700 cars inspected in that study, only about 15 percent were found to be completely sound and free from loss-associated defects. (See table 12, p. 12.) A more recent publication, Agricultural Research Service Study No. 52-25 of April 1969, is an in-depth analysis of the effect of boxcar defects on grain losses in transit. This study indicates that of almost 2,000 cars inspected, 55 percent were defective. In a recent study conducted at all the mills operated by Southern States Cooperative, 75 percent of the cars received under load were found to be defective in some respect that contributed to loss of the lading. I suggest that these two Department of Agriculture studies either be made a part of this record or at least be received for study by the committee and staff in connection with hearings on this legislation.

As of September 15, 1970, the farmer members of the Southern States were outstanding $42,000 in uncollectable claims. On August

27, 1970, we filed suit against the Penn Central Railroad in the U.S. District Court for Baltimore in order to toll the 2-year statute of limitations.

We have done all we can to get this problem solved. I personally have discussed this with railroad claim and traffic officials but to no avail. As chairman of a subcommittee of the American Feed Manufacturers, we appeared at seven production schools sponsored by that organization to acquaint mill personnel with proper unloading and weighing practices. All railroad presidents in the United States were advised of our efforts yet no reciprocal effort was made by them. The same subcommittee conferred with the Association of American Railroads and railroad claim officials in Chicago on October 21, 1969, without result.

It is a well-known fact that the boxcar fleet in the United States is deteriorating badly in both quality and quantity. Yet the very industry which furnishes the defective equipment causing our losses also refuses to indemnify the shipper or receiver for the very losses which they have caused. The railroads completely ignore their statutory responsibility to furnish suitable equipment.

Although some new equipment, such as covered hopper cars are being built, they are not being constructed in sufficient quantity to equal the number of boxcars retired each year. For this reason, it is clear that we are going to be faced with the continued necessity of using many old ill-suited boxcars for our shipments of grain and feedstuffs for many years to come. If those who are responsible for furnishing adequate equipment are able to continue to escape their responsibility for losses due to the condition of such a boxcar fleet it would mean to us a loss of $20,000 to $25,000 annually to our farmer-members. Multiply this loss by the number of grain and feed shippers in the United States and you have a staggering dollar total of losses on shipments of these commodities alone.

This legislation would not guarantee a settlement of all loss claims. However, it would give shippers the means to collect in court justifiable claims which are not being fairly settled by negotiation. Today we must accept arbitrary declinations of just claims to which we are entitled.

What shippers want, and what we are asking Congress to provide by this legislation, is incentive. Shippers want the railroads to adopt a reasonable and just claim policy. We believe that the railroads will only be incited to a fair consideration of claims if this bill is adopted. Despite the fact that the Interstate Commerce Commission in the last 3 years granted the railroads substantial freight rate increases in *Ex parte 256*, *Ex parte 259*, *Ex parte 262*, *and Ex parte 265*, there has been no improvement in rail performance.

In our judgment, this legislation, if enacted, will not substantially increase the number of court actions, but will make the railroads alter their claim policies when they realize that the doors of the courts are now open to all shippers on all claims both large and small. As the hearings on this bill before the Senate Commerce Committee conclusively established, shippers are not presently disposed to litigate their small claims, as the cost of the services of an attorney makes such action economically unfeasible. Railroads are now free to be, and have been, arbitrary in their settlements—the enactment of this bill will

change that. It may well be that a wise and just claim policy on behalf of the railroads will pay them dividends in goodwill and increased traffic that will more than offset their increase in cost due to the establishment of a fair claim policy.

It could also come about that if the railroads were faced with the dilemma of either paying claims or improving service, they would choose the latter approach. It is improved service that shippers are seeking by urging the passage of this bill.

The rail carriers' freight customers are businessmen and they realize that lawsuits are time consuming and expensive, regardless of the outcome, and they have no desire to spend their time preparing for a trial or sitting in a courtroom. However when they have been damaged, they should be permitted the opportunity to be made whole in the courts. If, as a result of the passage of this bill, more lawsuits are initiated, it will be entirely the fault of the carriers, as they can easily discourage these rightful actions by adopting responsible and reasonable claim policies.

We urge passage of S. 1653, which was unanimously approved by the Senate, because we believe it is the proper vehicle to attain the desired end of improved carrier service. We wish to discuss some of the amendments proposed by opponents of this legislation when they testified before the Senate subcommittee and give our reasons why we believe they should not be adopted.

We believe that the suggested amendments to the Senate bill, which would provide that no such fees shall be allowed to the plaintiff which exceed the amount of the judgment obtained, defeats the very purpose of this bill. Numerous witnesses before the Senate subcommittee, both in 1967 and in 1969, have pointed out that there is a tremendous problem in trying to settle small claims. In view of the present scale of legal fees such a condition in the bill would mean a practical denial of judicial relief for shippers with claims under $500 or even somewhat larger sums. There are very few attorneys who can afford to take small claims (less than $500) and spend the necessary time in preparation for trial, actual trial time, possible brief-writing on appeal, and even writs to the highest State court for less than $500 for their legal services. This suggested amendment would therefore deny effective relief for claimants who were able to establish in court that they were damaged, but whose claim was for a modest amount.

It was also proposed that S. 1653 be amended to include a provision that would grant a carrier a reasonable attorney's fee in the event that the plaintiff's claim for damages is denied by a court. There are several reasons why such a provision would defeat the very purpose of this bill. First, there is no question that the plaintiff who files suit against a carrier has been damaged. The only question that is at issue before the court is the matter of whether the carrier is responsible for the damages sustained.

S. 1653, which you are considering, does not guarantee that the plaintiff will recover his attorneys' fees, and it certainly does not provide that he will be successful in his legal action. This so-called reciprocal provision which has been suggested is not equitable. The shipper who has already been damaged due to the loss or delay in the shipment would face the possibility of adding to his loss. The reasons for this is that if he were unsuccessful in his suit, he would

be compelled to pay the carrier's attorney in addition to his own legal expenses. Due to the inherent vagaries of litigation, shippers would be reluctant to seek legal enforcement of their just claims for fear of incurring these double legal costs. Thus the bill, rather than being an incentive to carriers to settle claims on a reasonable basis, would merely provide them with another weapon to use against shippers who indicate an intention to sue to effectuate settlement of a claim.

Since numerous witnesses who testified in support of this legislation have given clear and cogent reasons why the reciprocal provision is not at all equitable, we shall not discuss them in this statement, but will remain content to enumerate them, as follows:

1. The sums spent by the carriers for legal services are already considered by the ICC as part of the carriers' costs when it authorizes the carriers to publish their tariffs and passes on carrier requests for general freight rate increases.

2. The need for this legislation is prompted because the carriers' claim policies have been arbitrary and shippers have been abused. There has been no demonstration of shippers abusing the carriers in the filing of claims.

3. The carriers are in a position to truly evaluate the reasonableness of a claim and can avoid litigation. The shipper usually does not know why the shipment was delayed or damaged and can only get the facts through interrogatories, discovery, or other judicial process, after he has filed suit.

4. The burden of proof is upon the shipper who has far greater difficulty in getting witnesses to testify since many of the persons who have knowledge of the cause of the damage or delay are not in his employ and are frequently located at some distance from the shipper and/or the court where the cause is litigated.

5. The real issue is not one of a different standard between litigants in the same action, but that of the correct standard in a matter of litigation between a public or quasi-public regulated industry and individual shippers who are the public.

For the reasons given in this statement it is clear to us that the shipper should have his right to a reasonable attorney's fee if he is successful in court. That success alone is cogent proof that the carrier has not fulfilled the obligation imposed by the statute to pay such a claim.

The Council therefore respectfully recommends your approval of S. 1653.

That is the end of my statement, but I would like to comment some on questions asked by Mr. Kuykendall.

Mr. DINGELL. It would be appropriate for you to do so, but since Mr. Graham wants to comment, let him proceed and then I will recognize you again.

Mr. HANSEN. Thank you.

Mr. GRAHAM. Mr. Chairman, on the question of collecting attorneys' fees for a successful plaintiff, I would like to call your attention to a 1967 Supreme Court case, *Fleischman Distilling* v. *Meier Distillery*. It states:

> As early as 1278 the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs.

Although American commentators have urged adoption of the English system in this country, the rule here has been that attorneys' fees are not ordinarily recovered in the absence of a statute or enforceable contract providing therefor. This court first announced that rule in *Arcambel* v. *Wiseman*, 3 Dall. 306. This case was in 1796, and they adhere to it in later decisions, and they cite a number of cases.

I must say what has been put into this record today, and the cases put in by the Office of the Comptroller General and the legislative research unit show that there is a valid basis for recovering attorneys' fees where the defendant is in the nature of a public carrier. Most of the attorney fee statutes are cases where there is a malice or fraud involved.

However, where the litigation arises where one party has a public liability, those are the types of statutes, and I would like to refer you to the hearing record which was made on S. 868 and on S. 1653 on the Senate side in 1967.

Mr. DINGELL. You are referring to the pages, and not the years.

Mr. GRAHAM. The page that I was citing was page 62 of the hearings on S. 1653, on June 10, 1969, in the report of the hearing.

I also would like to refer, if I may, to the statement made by the Chairman of the Interstate Commerce Commission on July 18 and reported at page 95 before the Subcommittee on Surface Transportation of the Committee on Commerce of the U.S. Senate on S. 858 in 1967.

The Chairman said that at the present time no provision in the Interstate Commerce Act permits a recovery of reasonable attorneys' fees by a successful plaintiff in such an action, although in some instances or perhaps a few, the recovery of a reasonable attorney's fee is permitted by State law.

While section 8 of the act permits the recovery of reasonable attorneys' fees in a successful action against a carrier for violations in the Interstate Commerce Act, it has been held that this provision has no application in an action for damages by a shipper under section 20(11), since the Commission has no jurisdiction over the subject matter, citing *Southern Pacific Railroad* v. *Harper Brothers*, which was a case cited by Mr. Kober in his testimony.

So I think it is conclusive that there is no legal basis by which a successful plaintiff can recover his attorneys' fees. I would submit to you that perhaps when the carriers testify tomorrow or at a later date you might put the question to them if they have ever, either voluntarily or as a result of a statute, paid an attorney's fee to a successful plaintiff.

Mr. DINGELL. This is a matter that staff has been directed to review. I was under the impression that the courts had authority to award such fees. There is some question here whether they have such authority, particularly related to the sections of the Interstate Commerce Act we have before us today. We are going to review that with some care.

Mr. GRAHAM. I think in the statutes provided for under contracts they do. If it is a loan company, the loan form usually agree to a 20-percent attorney's fee if action is necessary to bring about collection.

In tort actions, of course, there is no recovery. If a person is a plaintiff in a tort action, there are no attorneys' fees recovered.

Mr. DINGELL. I am sure you are aware that the attorneys' fees are usually far less than the actual value of the service provided, as awarded by the courts. It is rare, indeed, that court orders have ever fully compensated an attorney for his time, and he has to look to his client for the difference.

Are you folks interested in something different in the computation of attorneys' fees than that, or are you willing to adhere to the practices that we have had with respect to attorneys' fees?

Mr. GRAHAM. I have confidence in attorneys' fees and the discretion allowed to the judge. I think that a judge, is in a proper position to at least give a fair estimate of the advocate's time, the amount of time he must have spent in preparation and interviewing witnesses and the length of the hearing or trial.

So I would accept the S. 1653 version which leaves it up to the judge. On the question of not getting completely whole by the successful plaintiff, in that the court award might be less than his contingent fee agreement with his attorney. He would at least be better off under this law than he is at the present time.

There are certain instances where shippers have just been so fed up with the railroad that they file on a $400 claim, and counsel, after spending 3 days in trial, a brief in the district court—this is a State action—numerous witnesses, the legal fee, and I don't think he gouged his client, was $4,000.

Mr. DINGELL. I don't think that is excessive at all. I am keenly aware of the situation and I am troubled by it. I have a number of friends who have occasion to use the railroads from time to time. It is my experience that they have an impossible problem in securing justice, and I am not sure what you people are advocating will be of help.

It occurs to me we might set up a procedure whereby the ICC can actually handle the collection of these kinds of claims so that the shipper can get justice. I very much doubt if you are going to get much justice under S. 1653.

I have reason to think the best way would be to set up a mechanism whereby the ICC could provide the basis to adjudicate these claims and to award justice.

Mr. GRAHAM. My personal view, Mr. Chairman, is based on two things. First, I think it was about 1912, we had a small claims court that was Federal, and then Congress ceased to fund it.

Mr. DINGELL. In the ICC?

Mr. GRAHAM. No; I believe that it was a small Federal claims court, that ceased to be funded.

Another thing I strongly believe as an attorney, I don't like to see a Federal agency be granted the power to award money damages.

Whatever the ICC would do, if you would get an award after adjudication, and we have this in the Department of Agriculture under the Packers and Stockyards Act, they can adjudicate a claim between a stockyard and a shipper, and they come up with a judgment—if you will, a judicial order by the Secretary of Agriculture.

Now, this is not enforceable. The defendant is entitled—and this is the way Congress usually drafts its statutes—to a trial de novo in the district court.

So in truth and effect, what do you get with an award like that? That award, plus a good lawsuit, and you are able to collect. So by merely setting up in a regulatory agency a type of court, I don't believe that you can under the Constitution grant the power to award damages and an enforceable judgment to an independent agency. I don't think that Congress can do this to the judiciary.

There would have to be a legal process in a court to have a judgment that is entitled to full faith and credit. So I think that by setting up any type of a claims settlement bureau in an independent agency you will solve the problem. It will only remove the man one step further from his remedy, because whatever they say, he is going to have to take it into a district court some place to effectuate this judgment. Otherwise, the railroads would choose to ignore it—or any carrier, for that matter.

I must admit that I think we have enough problems down at the ICC at the present day in the areas where they do have jurisdiction. I just can't look to them as a cure-all for this problem.

Now, the ICC hasn't sought legislation of this nature. They have appeared before the Senate, and in support of this bill, and they believe, like we do, that this would be an incentive to the railroad industry. That is all we are talking about, and I think it is folly to talk about a proliferation of litigation simply because the plaintiff will be better off than he is now.

No businessman wants to spend his time in court and calling in his valuable people as witnesses. Litigation—and I agree with Mr. Kuykendall this morning—that due to the inherent vagaries of litigation, no one has a lock on any lawsuit.

I think a plaintiff, before instituting an action, would certainly see that he had a valid basis, and quite sincerely, I do not believe this would lead to claim sharking. But I really do believe that it would lead to the railroads saying that "well, if we are subject to attorneys' fees in addition to this $400 claim, maybe we ought to compromise this thing at 80 percent or 70 percent of the man's claim."

Shippers are pretty reasonable. They are no different than the rest of us, and no layman likes lawsuits, and I don't think, when we talk about small claims, that we are going to find a lot of lawyers who are interested in taking a $400 claim, because they could only get out of the client maybe $200, and if the judge awards them attorneys' fees, if he determines it is reasonable at $200, the attorney is going to say, "Why don't we get the carrier in here and see if we can settle this thing?"

Because most good lawyers have just as much work as they can do, they are not interested in a small claims business.

Mr. DINGELL. I am well aware of that.

Gentleman, the bells have rung for a quorum call on the floor. It will be necessary for the committee to adjourn at this time.

If you have further comments that you would like to submit, the Chair will afford you permission to make them to the committee by letter, Mr. Hansen.

The Chair notes that Mr. Glen Hofer of the National Federation of Grain Cooperatives has requested permission to insert a statement in the record, and without objection that permission is granted and Mr. Hofer's statement will appear at this point in the record.

(The following letter was received for the record:)

NATIONAL FEDERATION OF GRAIN COOPERATIVES,
Washington, D.C., September 29, 1970.

HON. SAMUEL N. FRIEDEL,
Chairman, Subcommittee on Transportation and Aeronautics, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. FRIEDEL: The National Federation of Grain Cooperatives supports passage of H.R. 9681 and wishes to associate itself with the testimony of Mr. John H. Frazier, Jr. and Mr. Rodman Kober of the National Grain and Feed Association.[1]

Our organization is composed of nineteen farmer-owned regional grain marketing cooperatives. In-transit grain losses from railroad equipment transporting our commodities are an everyday occurrence faced by our membership. We badly need the proposed legislation as a means of providing equity in our efforts to recover loss damages from the respective carriers.

Sincerely,

GLEN D. HOFER,
Executive Vice President.

Mr. DINGELL. It is going to be necessary for the committee to meet again on this matter at 10 o'clock tomorrow. The Chair wonders whether there is anyone present who desires to file a statement at this time.

STATEMENT OF MATT TRIGGS, ASSISTANT LEGISLATIVE DIRECTOR, AMERICAN FARM BUREAU FEDERATION

Mr. TRIGGS. I would be happy to file one on behalf of the American Farm Bureau Federation.

Mr. DINGELL. It will appear at this point in the record.

(Mr. Triggs' prepared statement follows:)

STATEMENT OF MATT TRIGGS, ASSISTANT LEGISLATIVE DIRECTOR, AMERICAN FARM BUREAU FEDERATION

We welcome the opportunity to present the views of Farm Bureau relative to the recovery of reasonable attorney's fees by shippers who have successfully maintained an action to recover damages for property losses sustained in the course of transportation by common carrier.

Farm Bureau is a general farm organization, wholly supported by dues paid by members, consisting of 1,865,854 families in 2812 counties in 49 states and Puerto Rico.

We respectfully urge that the Committee approve legislation to provide for reasonable attorney's fees in the circumstances summarized above.

S. 1653 and the various House bills (with the exception of H.R. 17367) were originally identical. The Senate has revised the language of S. 1653. We have no objection to the Senate revision. The revision does not change the purpose or significantly change the meaning of the original language. Since, in the closing days of the Congress it may be impossible for Conference Committees to meet, we respectfully recommend that the House accept the language adopted by the Senate.

Section 20(11) of the Interstate Commerce Act affirms the common law rule that a carrier has, with a few prescribed exceptions, an absolute liability for the delivery of goods.

This liability can be, and to an increasing extent is being, avoided by denying or not acting on claims filed by shippers, or by offering a fraction of the amount of the damages sustained. As one of our affiliated marketing cooperatives advised us: "Carriers do not employ claims adjusters to pay claims. They employ claims adjusters to avoid payment of claims." Rejection of or inaction on claims defeats the purpose of Section 20(11) of the Act. Many

[1] For testimony referred to, see p. 22, this hearing.

shippers and particularly small shippers, cannot afford to pursue the legal remedy available to them, because the costs involved in such action may equal or exceed any settlement that may be obtained.

Our support of the bill is not based on any expectation that its enactment will result in a large volume of litigation—but rather that it will result in settlement of many claims that should be settled without litigation. A supplemental factor of substantial importance is that it would establish an incentive to carriers to prevent loss and damage of property entrusted to them for transportation.

Legislation to authorize the court to allow reasonable attorney's fees to a successful plaintiff, would give meaning to Section 20(11) of the Act. It would validate this provision of the Act by providing an effective means to implement its purpose.

Provision for attorney's fees to successful plaintiffs is by no means unusual. For example, similar provisions are incorporated in Sections 8, 15(9), 16(2), 20(12), and 308(b) of the Interstate Commerce Act.

Unless there is a practical, timely and economic means whereby justified plaintiffs may be made whole by judicial action, the judicial system fails to provide full justices to such plaintiffs.

We appreciate this opportunity to express our support for Attorney's Fee legislation. We respectfully recommend the committee's prompt and favorable attention.

Mr. BURROWS. Mr. Chairman, I am Fred Burrows. I was a former vice president of the International Apple Association. This is now merged with the National Apple Institute, and we are now the International Apple Institute.

I will be happy to file a statement.

Mr. DINGELL. Very well. Your statement will appear at this point in the record as if given in full.

(Mr. Burrows' statement was not available to the committee at the time of printing.)

STATEMENT OF OAKLEY M. RAY, VICE PRESIDENT, AMERICAN FEED MANUFACTURERS ASSOCIATION

Mr. RAY. O. M. Ray, American Feed Manufacturers Association, and I would like to file our statement.

Mr. DINGELL. Without objection, your statement will appear in the record at this point.

(Mr. Ray's prepared statement follows:)

STATEMENT OF OAKLEY M. RAY, VICE PRESIDENT, AMERICAN FEED MANUFACTURERS ASSOCIATION

My name is Oakley M. Ray. I am Vice President of the American Feed Manufacturers Association. My office address is 1725 K Street, N.W., Washington, D.C. 20006. Members of the Association produce more than 70% of the feed which is sold by primary feed manufacturers.

We would like to strongly urge the passage of this proposed legislation.

Our basic problem is the frequent physical losses which occur during the rail shipment of feed ingredients which we purchase. These losses often cause feed manufacturers to pay for a larger quantity of ingredients than is actually received. In the majority of cases the amount of the shortage is not sufficient to justify the costs which would be incurred if litigation against the railroad was undertaken to obtain a just settlement of the claim. The railroads, of course, understand this, and we frequently find ourselves at their mercy as they make decisions as to whether or not to honor claims. The passage of this legislation would encourage the railroads to honor claims when the evidence indicates that the carrier is at fault.

The basic problem appears to be the dilapidated condition of many of the freight cars which are used to transport feed ingredients. This is a problem which confronts every feed manufacturer who uses rail transportation for the

delivery of ingredients. The shipper cannot afford to reject defective cars because of the acute shortage of railroad equipment. If he rejects a defective car, he will likely be unable to get a replacement within a reasonable amount of time. Thus, he repairs the cars as best he can, and uses them.

A research study by the U.S. Department of Agriculture documented the extent of the problem. The results were published in August 1966 in USDA Marketing Research Report No. 766 entitled *Losses in Transporting and Handling Grain by Selected Grain Marketing Cooperatives.*

USDA researchers carefully checked the physical condition of 700 box cars which were furnished by the railroads for the transportation of grain. Eighty-five percent of the 700 cars inspected were found to be defective. The most common defects were holes, cracks or both. Obviously these are vitally important in the transportation of feed ingredients in bulk. The table below summarizes the results of the inspection of the 700 cars as published in USDA Marketing Research Report No. 766.

LOCATION OF DEFECTS IN 700 INSPECTED RAIL CARS, AND EXTENT AND CHARACTER OF DEFECTS

Location of defect	Percentage of cars with defects	Character of defect	Percentage of defects of this character
Floor	34	Holes	36
		Cracks	54
		Weak or rotted	10
End	45	Holes, cracks	33
		Part missing	30
		Battered	15
		Loose liner	5
		No liner or improvised liner	17
Sidewall	76	Bad or missing doorposts	41
		Missing boards	13
		Holes, cracks	21
		Broken boards	25
Roof	11	Cracks, holes, bad seams	56
		Loose liner	25
		Part of liner missing	19

With this quality of equipment it is not surprising that more than 60% of the 13,611 cars of grain studied in the USDA project had losses during shipment. The average loss for the cars which had losses was 923 lbs. per car between origin and destination. Cars tended to have larger losses as the distance shipped increased. Shipments that moved over 1,000 miles averaged much higher losses than those under 1,000 miles.

Until proper equipment is made available by the carriers for the shipment of feed ingredients, feed manufacturers are likely to continue to be faced with the problem of losses which are caused by the defective equipment now in use. We believe that the passage of this legislation would encourage the railroads to provide improved equipment which would prevent losses. It would also encourage them to give fair and prompt consideration to a just settlement of losses caused by defective cars.

Passage of this legislation would not encourage shippers to take court action where the railroad was not at fault, since attorney fees would not be awarded to the shipper unless the fault of the carrier could be established.

Thank you for the opportunity to present this statement.

STATEMENT OF JOSEPH E. QUIN, TRANSPORTATION CONSULTANT AND LEGISLATIVE REPRESENTATIVE, THE NATIONAL GRANGE

Mr. QUIN. Mr. Chairman, if I may identify myself further, my statement may be filed. I am transportation consultant and legislative representative of the National Grange. I wish to add, first of all, the address in Washington, 1616 H Street NW., Washington, D.C.

Also, I want to state that I am an attorney for 40 years. I was with the USDA when this subject came up over there, as to whether the

USDA would approve this legislation. I rewrote the letter that evidenced our approval.

I want to say that I agree with the statements that have been made here by Mr. Don Graham.

Mr. DINGELL. I observed your nodding "no" with regard to attorneys' fees on these matters, too.

Without objection, Mr. Quin, your statement will appear in the record at this point.

(Mr. Quin's prepared statement follows:)

STATEMENT OF JOSEPH E. QUIN, TRANSPORTATION CONSULTANT AND LEGISLATIVE REPRESENTATIVE, THE NATIONAL GRANGE

My name is Joseph E. Quin. I am Transportation Consultant and Legislative Representative of The National Grange, which is a farm and rural-urban family organization representing 7000 community Grange organizations with a total membership of over 600,000 persons.

This statement is made to evidence support of legislation to amend the Interstate Commerce Act to permit recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property. S. 1653, as it passed the Senate, and what we understand is an identical house bill, H.R. 17367, would accomplish this purpose.

The National Grange, in all its aspects, as a representative of our members, the farming community of the nation, and the general public, has for many years had a considerable interest in this matter. In Senate hearings I set forth our reasons for supporting S. 1653 in its original form and subsequently stated that we had no objections to two amendments to the bill that were made before passage. One amendment would provide for a cooling-off period before suit by allowing the filing of a complaint only after a claim has not been paid within 90 days after receipt of a claim by the carrier or its agent. The other would give the court discretion in awarding attorneys' fees to the successful plaintiff. We consider this second change a refinement or expansion of the provision for a "reasonable fee".

Most agricultural commodities are particularly susceptible to loss or damage in the course of transportation. Many are notably perishable or subject to rapid and easy deterioration. In the case of commodities in which condition of the commodity and time of arrival at destination, for purposes of meeting marketing demands or otherwise, are all-important, the lack of dependability of deliveries is particularly important.

The shipper or receiver has knowledge only in rare instances of what has occured during transit to cause the damage he suffered. For the most part, he cannot know that the damage was not the result of an "act of God" or other cause beyond the responsibility of the carrier. On the other hand, the carrier is or should be able to ascertain from carrier transit records or evidence of carrier employees whether or not it or a connecting line was at fault or negligent. Despite, or perhaps because of, this superior position of the railroads they have normally refused to pay claims for delay and have generally refused to pay full compensation for other damages, knowing that if the claimant seeks relief in the courts he will not be able to recoup his costs for attorneys' fees. On small claims, including the usual claim for delay in delivery, court action is not economically practicable, for the claimant has to recognize that it will not give him full relief and could well cause him a net loss in money.

The result is probably predictable. It is no secret in the transportation field, and frequently acknowledged by railroad representatives, that such representatives take the cost of attorneys' fees to claimants into account when dealing with claims and subtract such cost from probable recoveries. Failure of the carriers to pay proper damages of course results in lessened returns to the producer of the agricultural commodity involved or in increased cost to the consumer.

It does not appear necessary here to dwell on the reasons and need for legislation such as S. 1653. Hearings in past years on similar bills have gone into the matter at length. The proposed legislation is necessary to redress an imbalance between the carrier and the person that uses its services.

There is ample precedent in the Interstate Commerce Act for allowing a reasonable attorney's fee to shippers or receivers where they successfully maintain an action at law. As stated by the Assistant Comptroller General of the

United States, Frank H. Weitzel, in a letter to Chairman Magnuson of the Senate Committee on Commerce, dated February 24, 1967, reporting favorably with respect to S. 858, an identical bill to the original S. 1653, the bill's allowance of such a fee "is in harmony with the other provisions of the Act and with court decisions permitting recovery of an attorney's fee in other kinds of action."

Recovery of a reasonable attorney's fee is permitted by Section 8, Part 1, of the Interstate Commerce Act in an action for damage sustained as a result of a violation by a common carrier of the provisions of Part 1 of the Act; and by section 16(2) of said Part in an action brought to enforce an order of the Commission for payment of money. Under Section 20(12) of the same part of the Act, an initial or delivering carrier can recover from an intermediate or connecting carrier, on whose line loss of or damage or injury to property occurred, not only the amount of the loss, damage or injury, but also "the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property". The Assistant Comptroller General, in the letter previously mentioned, cited *Strickland Transport Co.* v. *Harwood Trucking, Inc.*, Mo. App. 1961, 248 S.W. 2 581 as an instance of recovery of a reasonable attorney's fee under this section.

The Interstate Commerce Act should allow a carrier's customer to recover any expense reasonably incurred by him for an attorney's fee where the carrier fails or refuses to settle a just claim and the customer is forced to take court action to secure relief.

Mr. Chairman, this concludes my statement except that my earlier reference to an imbalance between the carriers and the users of transportation in connection with claims for loss or damage in transit leads me to another matter on which I feel I should perhaps comment, although it is not directly raised by S. 1653 or H.R. 17367. On earlier occasions when such legislation was considered it has been suggested by the carriers that if the proposed legislation is to pass it should be amended to provide for attorneys' fees on a reciprocal basis i.e if a carrier were successful in a law suit it should be able to collect an attorney's fee. This suggestion on cursory examination has an attractive aspect of fairness—of treating all parties alike. However, we believe that it can easily be demonstrated that the result would be otherwise. A provision for fees to carriers would not lessen the existing imbalance but would add to it. We suspect and fear that if such a provision existed, the carriers (whom it may be recalled, are in a superior position to know the facts) will habitually point out to a claimant that in case of an unsuccessful law suit he will have to pay not only his own attorney's fees but also those of the carriers—and that the carriers will discount the amount of any offer in settlement by two sets of attorneys' fees rather than one as at present.

A number of reasons or arguments can be and have been advanced against a provision for collection of an attorney's fee by a carrier. Some are controversial, resting on allegations of carrier abuses, and lack of abuses on the part of shippers or receivers. Others rest on legal and factual questions regarding the measure of difficulty each party may face in sustaining its position in court. We shall not here discuss or repeat these points but shall limit ourselves to one point we believe to be incontrovertible and conclusive. Carriers normally and particularly railroads have legal staffs whose salaries, fees and expenses are a cost of doing business which is reflected in the transportation charges paid by the user of the transportation services. Thus it may be said that such users, including those who have claims against the carriers, are already paying for the carriers' attorneys. If an unsuccessful claimant is to be assessed an additional attorney's fee, he may be said to be paying the carrier twice.

Mr. Chairman, the National Grange appreciates the opportunity to present its views on the legislation under consideration.

Mr. DINGELL. The Chair wishes to thank all our witnesses this morning for their helpful presentations. If there is no further business, the subcommittee will stand adjourned.

(Whereupon, at 12:50 p.m., the subcommittee adjourned, to reconvene at 10 a.m. of the following day, Wednesday, September 30, 1970.)

ATTORNEYS' FEES FOR PROPERTY LOSS OR DAMAGE

WEDNESDAY, SEPTEMBER 30, 1970

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Brock Adams presiding (Hon. Samuel N. Friedel, chairman).

Mr. ADAMS. The subcommittee will resume its hearings.

Our first witness this morning will be the Honorable Frank Annunzio, of Illinois.

It is good to see you this morning, Mr. Annunzio. Please proceed as you see fit, sir.

STATEMENT OF HON. FRANK ANNUNZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. ANNUNZIO. Mr. Chairman, it is a privilege to appear before this subcommittee today with reference to my bill, H.R. 8138, and related legislation, and I want to express my appreciation to the distinguished chairman, Hon. Samuel N. Friedel, and the members of the subcommittee for their action in calling this hearing to consider my measure.

My bill, Mr. Chairman, proposes to amend 49 U.S.C. § 20(11) to allow the recovery of a reasonable attorney's fee in the case of the successful maintenance of an action for the recovery of damages sustained in the interstate transportation of property by common carrier, railroad, or transportation company—excluding water carriers.

As the law now stands, a shipper is entitled to recover his full actual loss, damage, or injury caused by the covered carrier. But—absent a voluntary settlement—his only recourse in this regard is a civil action for damages in either a State or Federal court because the Interstate Commerce Commission has no jurisdiction over claims for loss or damage to shipments in transit by interstate carriers (see *S. Landow & Co.* v. *Boston & M.R.*, 208 I.C.C. 699; *Fuel Sales Corp.* v. *Delaware L. & W.R. Co.*, 225 I.C.C. 288); hence, it has no power to settle loss and damage claims between shippers and carriers. Additionally, there is no provision in the Interstate Commerce Act which permits the recovery of a reasonable attorney's fee by a successful plaintiff-shipper in such an action before the courts.

Given the expense of litigation, and in the case of the small or occasional shipper, it cannot be said that the civil action remedy is truly effective as, in many cases, the amount of the contested claim may be

for less than the fees of the attorney retained to prosecute the claim. In these circumstances, an inordinate temptation is presented to the carriers to resist the more modest claims either entirely, or to recognize them only to the extent of their ability to exact a settlement which is grossly inequitable. This situation, I respectfully submit, is opposed to justice—a carrier who forces another in these circumstances to engage counsel to defend or vindicate a right should be made to bear the expense of such engagement, and not the successful shipper.

The remedying of this injustice is the overriding purpose of my bill, H.R. 8138; for if enacted, the bill would accomplish the following: (1) It would encourage carriers to provide adequate equipment and establish more effective procedures for claim prevention; (2) it would encourage the prompt and just settlement of meritorious claims without going to court as both sides to a dispute would be in an equal bargaining position; thus, there would be an economic incentive to the carriers to offer just settlements and fair claim handling practices to the public; and (3) it does not provide for any court congestion or undesirable impact on litigation as nonmeritorious suits and claims are discouraged by reason of the fact that the claimant would know that he would have to pay for his own attorney's fees if he is unsuccessful.

In summary, then, H.R. 8138, if enacted, would close the gap in existing law which permits carriers to arbitrarily and successfully avoid payment of the just claims of shippers for loss or damage to property in transit. For this, and the above reasons, I respectfully urge your early and favorable action on H.R. 8138.

Mr. ADAMS. Thank you, Mr. Annunzio; for appearing here this morning. Your views on this legislation are appreciated.

Mr. ANNUNZIO. Thank you, Mr. Chairman, for affording me the opportunity to present my views.

Mr. ADAMS. Our next witness will be Mr. John F. Donelan, general counsel for the National Industrial Traffic League.

Welcome to the committee, Mr. Donelan. We are pleased to have you with us. I have a copy of your written statement, which you may either give or you may summarize, whichever is your preference.

STATEMENT OF JOHN F. DONELAN, GENERAL COUNSEL, NATIONAL INDUSTRIAL TRAFFIC LEAGUE; ACCOMPANIED BY JAMES E. BARTLEY, ASSISTANT GENERAL MANAGER

Mr. DONELAN. I would like to introduce Mr. James Bartley, assistant general manager of the Industrial Traffic League, for whom I am appearing. With your permission, he will sit at the table with me.

Mr. ADAMS. That will be fine.

Mr. DONELAN. My name is John F. Donelan. I am senior partner in the law firm of Donelan, Cleary & Caldwell, Washington Building, Washington, D.C. I appear here today in behalf of the National Industrial Traffic League, of which I am general counsel.

IDENTITY AND INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

The National Industrial Traffic League—which I shall sometimes refer to as the league—is a voluntary organization of shippers, shippers' associations, boards of trade, chambers of commerce, and other

entities concerned with rates, traffic, and transportation. The league has been in continuous existence for more than 60 years and has actively been concerned with matters involving transportation before the Federal regulatory bodies, the courts, and the Congress. The members of the National Industrial Traffic League are located throughout the United States, consist of enterprises large, medium, and small, and use all modes of transportation, by land, sea, and air. Carriers are ineligible for membership in the league.

The matter here before us pertains to the critical subject of appropriate remedy for shippers of freight via interstate common carriers by railroad or motor carrier, or freight forwarder, in a case of loss, damage, or injury to property in the course of transportation.

This subject is covered by section 20(11) of the Interstate Commerce Act which in pertinent part provides as follows:

> That any common carrier . . . subject to the provisions of this part receiving property for transportation . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability here imposed; and any such common carrier . . . shall be liable to the lawful holder of such receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill-of-lading has been issued or not, for the full actual loss, damage or injury to such property caused by it . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void . . .

This also applies to interstate common carriers by truck pursuant to section 219 and to interstate freight forwarders pursuant to section 413 of the Interstate Commerce Act.

A reading of the above statutory language give the impression of substantial protection to the shipper using common carriers in interstate transportation. The fact is there are major limitations. First, it must be recognized that the Interstate Commerce Commission itself has held it has no jurisdiction over individual claims for loss or damage to shipments in transit by interstate carriers (see *S. Landow & Co., Inc.* v. *Boston & M.R.*, 208 ICC 669 at 670; *Fuel Sales Corp.* v. *Delaware, L. & W.R. Co.*, 25 ICC 288 at 289). To pursue the remedy for loss, damage, or injury to property, the shipper must resort to the courts.

This brings us to the nub of the problem. Shipments, of course, vary in size and in value. The more modest the shipment, particularly in value, the more complex the problem of resorting to the courts in the case of loss, injury or damage to property transported. There is a practical side to the question. If a shipper does recover, but in the process incurs substantially greater expense for legal services than the amount involved, his victory is a dubious one.

The natural question which arises is whether the successful shipper plaintiff can also recover a reasonable attorney's fee in connection with the litigation. There is legal authority to the effect he cannot. *Thompson* v. *H. Rouw Co.*, Tex. Civ. App., 237 S.W. 2d 662; *Missouri Pac. R. Co.* v. *Harper*, 201 F. 671.

It takes no imagination, in this practical world of ours, to recognize the inordinate temptation presented to the carriers to resist the more modest claims entirely or to exact settlements which are in fact grossly inequitable, because they realize the expense to which a shipper claimant will be put in incurring attorneys' fees which may well be larger, and often undoubtedly will be larger, than the amount of the claim itself.

PROPOSED SOLUTION OF THE PROBLEM

H.R. 9681, H.R. 8138, H.R. 8609, H.R. 9072 and H.R. 14017 would amend paragraph 11 of section 20 of the Interstate Commerce Act (49 U.S.C., sec. 20, par. 11) by inserting at the end of the fifth proviso and immediately before the sixth proviso the following:

> And provided further, That if the plaintiff shall finally prevail in any action, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit.

The above language also appeared in S. 1653 as originally introduced in the Senate on March 24, 1969, by Senator Magnuson, Chairman of the Senate Commerce Committee. The League had supported S. 1653 before the Subcommittee on Surface Transportation of the Senate Commerce Committee.

After hearings, S. 1653 as amended and reported by the Senate Commerce Committee on December 22, 1969, contained the following language to be inserted at the end of the fifth proviso and immediately before the sixth proviso of paragraph 11 of section 20 of the Interstate Commerce Act (49 U.S.C., sec. 20, par. 11):

> And provided further, That the court, in its discretion, may allow a reasonable attorney's fee to the plaintiff in any successful action, to be taxed and collected as part of the suit, but no such fees shall be allowed to the plaintiff except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and that such claim has not been paid within ninety days after receipt of the claim by the carrier or its agent.

The above amended language was passed by the Senate by unanimous consent on January 26, 1970. The identical language is incorporated in H.R. 17367, which is before your subcommittee.

THE PROPOSED LEGISLATION MAKES A MOST DESIRABLE CONTRIBUTION TO SOLVING THE INSTANT PROBLEM

Recognizing that the League strongly supported the language in the original version of S. 1654, the League also strongly supports the language in S. 1653 in its present form.

Mr. KUYKENDALL. Would you yield there?

Mr. DONELAN. I certainly would.

Mr. KUYKENDALL. This same technical error was made by a witness when he said "identical language to the Senate language."

I think you will find that the Senate language is permissive on the assessment of the fee, and the House bills are all mandatory. I believe you will find that that part of the language is not identical.

You said "identical," and I thought you would want to clear up the record there.

Mr. DONELAN. Mr. Kuykendall, if that is a fact, I certainly welcome and accept the correction.

Mr. KUYKENDALL. One is permissive, and one is mandatory.

Mr. DONELAN. The fact that it is permissive is by no means objectionable to the League.

Mr. KUYKENDALL. I understand your description of the Senate bill is accurate, but the other bills, for instance, H.R. 9681, it says, "He shall be" and not "he may be."

Mr. DONELAN. Thank you for that clarification, which I think is quite important.

Thus, the League not only supports H.R. Nos. 9681, 8138, 8609, 9072, and 14017, but now presents its special and strong support to the language in S. 1653 in the form in which it passed the Senate. In other words, the League not only finds acceptable, but earnestly endorses, S. 1653 as passed by the Senate, H.R. 17367, and amendment to H.R. 9681 and the other bills before the subcommittee to conform to S. 1653 in its present form. Hereinafter, for simplification our comments will be directed to S. 1653 in the form and content in which it passed the Senate.

The League is of the view that that is most desirable and essential legislation. It will tend to balance more evenly the scales of justice between the shipper, on the one hand, and the carrier, on the other. It will greatly minimize the temptation, to which we have adverted, now present to the carrier to resist the more modest claims because the shipper claimant is confronted with the hazards of litigation and the necessity for incurring the expense of legal services to advance his claim.

If the court finds the claim without validity, the shipper must incur the expense of the legal services involved. On the other hand, if the court finds that the shipper's claim is meritorious and upholds it, the plaintiff, in the court's discretion, may be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit, with a limitation, on which I wish to comment. No such fees shall be allowed to the plaintiff except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and that such claim has not been paid within 90 days after receipt of the claim by the carrier or its agent.

This limitation was proposed by the Chairman of the Interstate Commerce Commission and was supported by the Department of Transportation. The Senate Commerce Committee in its report on S. 1653, page 8, expressed the belief:

> . . . that this 90-day cooling-off period will have a salutary effect in promoting settlements and discouraging hasty filing of suits.

In the interest of obtaining a prompt solution to the problem with which we are all here concerned, the above principle commends itself to the league and has the league's support.

There is precedent for the approach we here support to be found in section 8 of the Interstate Commerce Act, which provides as follows:

> That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

If it is asked why the shipper does not have the very remedy he seeks in section 8, we point to the court decisions previously cited. By the addition of the amendment proposed in S. 1653, as passed by the Senate, the remedy available to the shipper for loss, damage, or injury to property will be available, subject to ultimate approval of the court as to recovery of a reasonable attorney's fee. There will be an end to the past and present disability confronting shippers, particularly with respect to shipments of small or medium value, where under the present circumstances as a practical matter they are without remedy when the carrier assumes an arbitrary position in denying the validity of claims.

The legislation the League here supports is essential and is long overdue. S. 1653, as passed by the Senate, will substantially strengthen section 20(11) of the Interstate Commerce Act and will make a genuine contribution toward achieving the objectives of that vital statutory provision.

The National Industrial Traffic League, accordingly, strongly supports enactment of S. 1653 as passed by the Senate or enactment of the House bills here before the subcommittee amended to conform to S. 1653 as passed by the Senate.

We very much appreciate the opportunity to present these views.

Mr. ADAMS. Thank you very much, Mr. Donelan.

Mr. Kuykendall?

Mr. KUYKENDALL. Mr. Donelan, we appreciate your views.

May I get a couple of legal points clear here? May you, under the law, and I am not an attorney so I will explain my ignorance here a little; may you under the law, file more than one claim in one lawsuit?

Mr. DONELAN. Yes, that can be done.

Mr. KUYKENDALL. How many may be filed in one lawsuit? If one of your members had a month's claims of, say, 25 claims, with that many in a month, of small stuff—$15, $20, $30 each, or even $50 each. Is it the practice that they combine these?

Mr. DONELAN. I would say, first of all, that this is subject to the rules of the particular court or forum. I would say, secondly, that if the claims all partook of the same substance and arose out of the same transaction, they could be combined.

I would say if they were unrelated, they could not be combined.

Mr. KUYKENDALL. Would you care to have us explore in this committee—and this is only a hypothetical idea I am throwing out here, because it arose in my mind after yesterday's hearing—that, let's say, because of the extremely small claim and the fact that it costs an attorney just as much to process a $50 claim as it does to process a $500 claim—it is like collecting mortgages; there is no difference in the collection cost depending on the size of the mortgage—if somehow you were given legal permission or mandate to be able to combine, say, as many as 10 claims that total not more than $1,000, would this tend to relieve your situation in the lawsuit process?

Mr. DONELAN. Well, I would have to answer that individually, Mr. Kuykendall, because I have not taken this up with the committee, but I will be happy to do so.

Mr. KUYKENDALL. I want you to give me your first impression off the top of your head.

Mr. DONELAN. I personally do not feel that that particular aspect of the matter is regarded as presenting any particular problem to the claimants, the shipper claimants.

I think that they would be satisfied to work under the applicable court rules wherever they may be. I think the nub of the problem is this question of having the opportunity in an appropriate case to recover an attorney's fee. Therefore, I might say this further, and I know you will understand this is said in total respect, that it is the earnest hope of the League that this law or this bill will be enacted into law in this session.

We would hope that it would be possible on the merits of the issue now before you that they be resolved in favor of the bill, S. 1653, and that your subcommittee will recommend favorable action.

Mr. KUYKENDALL. How would you react to an amendment like this in this act? Were you at yesterday's hearing?

Mr. DONELAN. I was not, Mr. Kuykendall.

Mr. KUYKENDALL. Have you discussed yesterday's hearing?

Mr. DONELAN. I have some knowledge of what transpired.

Mr. KUYKENDALL. Then you know there is concern about the wholesale shyster approach to this thing, or a fear of that on this committee. I personally want some kind of assurance.

In thinking about this overnight, here is what enters my mind, that in a case where the judge determined no award and no merit to the case, that he would also have the right to make a reverse assessment of the attorney's fees.

Mr. DONELAN. I would say this——

Mr. KUYKENDALL. In other words, if he determined that somebody had really brought a ringer in on him and wasted his time in court, that not only does he have the right, in the case of a good case, to assess the attorney's fee against the carrier, but in this case he would have a right to assess the attorney's fee against the other side.

Mr. DONELAN. I would say this, Mr. Kuykendall. I have had occasion to think about this question in the past.

First, let me say that the overall policy that we feel will be achieved if this bill is enacted into law is that the carriers are going to be much more amenable to resolving these problems so that there is not going to be a flood of litigation.

Mr. KUYKENDALL. Sir, we believe there is, and I believe your job is to sell us. We believe there is, so you have to sell us.

Mr. DONELAN. You believe there is a danger that there will be a flood of cases?

Mr. KUYKENDALL. I believe there will be, at least temporary. I happen to agree with the worthiness of most of your cause, but I also want some insurance here, and I would like to have some insurance that would be acceptable to any really reputable operator.

Mr. DONELAN. I will say something else individually, as a member of the bar, that I do not accept the generalization that the members of the bar will indulge in shyster practices.

Mr. KUYKENDALL. Let me remind you, sir, that you are selling here, not buying, and I believe what I am saying, and I am one of the six guys sitting in the driver's seat here. Your opinions on your profession are respected, but that doesn't sell me. Would you tell us what your profession is going to do?

Mr. DONELAN. I would, Mr. Kuykendall. I would say, secondly, that shyster practices are, of course, subject to control by the bar of the individual States, and if shyster practices occur, I would expect that a court could very well refer conduct of that nature to the appropriate committee of grievances of the bar association.

We had such a situation, not involving claims, recently in the District of Columbia, without passing on the merits one way or the other.

Mr. KUYKENDALL. Could this be in the report, that this be in the report as a suggestion if this practice does appear?

Mr. DONELAN. I would think that would be a provocative suggestion.

Mr. KUYKENDALL. I will accept it. I would like you to accept the fact that all is not perfect in your profession, and then go ahead.

Thank you, Mr. Chairman.

Mr. ADAMS. Thank you, Mr. Kuykendall.

Mr. Donelan, do you insure your shipments as shippers, or is this carried by an insurance carrier for the carriers, or are they self-insured? In other words, I am trying to get at who is the other party that tends to drag their feet in these settlements.

Mr. DONELAN. For example, motor carriers are required to carry insurance.

Mr. ADAMS. So you are dealing with the insurance carrier, or the insurance company that has insured the particular shipments rather than the carrier itself in most of these instances?

Mr. DONELAN. With respect to railroads——

Mr. ADAMS. Railroads are self-insured?

Mr. DONELAN. I don't want to say that motor carriers don't have the prerogative to be self-insurers, but I want to say that the reports that continuously come to me are that the shippers are dealing with claims agents of the railroads or claims agents of the trucklines, so that they are dealing not with insurance companies, but with the carriers.

Mr. ADAMS. I see; that is in the original instance. Then, however, if you go into court, I assume it is like most businesses, where their insurance carrier defends them. Is that correct?

Mr. DONELAN. I don't want to pass judgment on the individual situation.

Mr. ADAMS. But from your experience?

Mr. DONELAN. I would say that the carrier, so far as the outside world is concerned, is the defendant.

Mr. ADAMS. I know that.

Mr. DONELAN. You deal with his lawyer, the carrier's lawyer.

Mr. ADAMS. The point I am making, though, is who may or may not be an insurance company lawyer. There is a lot of difference, and those of us that have tried a lot of lawsuits know the difference when you are dealing with an individual carrier or company or person and when you are dealing with an insurance company lawyer.

Generally they run a very large law firm, they have many lawyers, they are always behind on their trial calendar, and they delay you to death in most of these cases. I am trying to find out as a matter of fact who you are dealing with here, but if you don't know precisely——

Mr. DONELAN. I don't want to appear to speak with authority on that in terms of the 50 States, Mr. Chairman.

Mr. ADAMS. Thank you, Mr. Donelan.

Mr. DONELAN. It is a privilege to be here, and I appreciate the opportunity to answer particular questions which may be of importance to the subcommittee.

Mr. ADAMS. Our next witness is Mr. Charles A. Webb, president of the National Association of Motor Bus Owners.

STATEMENT OF CHARLES A. WEBB, PRESIDENT, NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

Mr. WEBB. Good morning, Mr. Chairman.

Mr. ADAMS. Good morning, Mr. Webb. Welcome. You may give your statement in toto or summarize it, whichever you prefer. We have a copy of it.

Mr. WEBB. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, my name is Charles A. Webb. I am president of the National Association of Motor Bus Owners, often referred to as NAMBO.

NAMBO is the national trade association for the intercity motorbus industry. Its members include Greyhound Lines, all companies affiliated with the National Trailways Bus System, and more than 400 carriers not affiliated with either system. Collectively, these carriers provide over 90 percent of the intercity motorbus transportation in the United States. In addition to passengers and their baggage, they transport a substantial volume of package express.

H.R. 9681 and related bills would provide for allowance of a reasonable attorney's fee to plaintiffs who prevail in actions brought under section 20(11) of the Interstate Commerce Act for recovery of loss or damage to property. Section 219 of the act makes the provisions of section 20(11) applicable to motor carriers. NAMBO is opposed to enactment of H.R. 9681 in its present form for the reasons hereinafter set forth.

Attorneys' fees are not ordinarily recoverable as damages in tort actions or in actions for breaches of contract. As a general rule, successful litigants, plaintiffs as well as defendants, are required to bear the expenses of litigation, including the payment of their attorneys. Any general rule to the contrary would discourage voluntary settlement and promote litigation.

By statute, various exceptions have been made to the general rule that successful litigants are not entitled to an allowance for reasonable attorneys' fees. For example, recovery of reasonable attorneys' fees has been authorized in actions involving elements of fraud, malice, and wanton negligence, or as a penalty or sanction against conduct expressly prohibited by statute or regulation. These general rules respecting the recovery of attorneys' fees are clearly reflected in the Interstate Commerce Act.

Under the provisions of the act, causes of action against carriers are authorized in literally hundreds of situations. There are only five classes of action, however, in which the act provides for the allowance of attorneys' fees. The common characteristics of these statutory provisions is that the defendant carrier can readily avoid judgment and the assessment of attorneys' fees by not engaging in conduct which is expressly prohibited.

For example, sections 8 and 16(2) of the act provide for an allowance of attorneys' fees, but only if the defendant is found to have violated an express provision of the act or the term of a Commission order. Liability under section 15(9) of the act for payment of attorney's fees arises only if a carrier disregards routing instructions, and under section 222(b)(2) only if a carrier engages in unlawful operations or seeks to restrain another carrier's lawful operations. Liability for payment of attorneys' fees under section 20(12) of the act can be avoided if carriers ultimately responsible for loss and damage claims promptly reimburse connecting carriers for expenses incurred in their behalf.

The proposed amendment to section 20(11) is not consistent with the present provisions of the act awarding attorneys' fees unless carriers reasonably may be expected to avoid liability for loss and damage claims. This is obviously impossible. For example, Greyhound alone transports about 27 million pieces of checked baggage and more than 25 million express shipments each year. Although its record for loss and damage prevention is good—less than one claim for every 1,000 shipments—the company paid 32,318 claims in 1966 for loss or damage to baggage and express. Inevitably, some shipments will be lost or damaged.

We do not suggest that it would be improper for the Congress to provide for recovery of attorneys' fees to plaintiffs who prevail in transportation loss and damage actions if such legislation is required to insure prompt and fair disposition of claims. Virtually all the supporting testimony on S. 858 before the Senate Subcommittee on Surface Transportation in the last Congress and on S. 1653 in this Congress involved shipper dissatisfaction with handling of loss and damage claims by rail carriers. Much of that testimony was confined to the railroads' refusal to pay for decline in the market value of perishables resulting solely from failure to meet train schedules.

We express no opinion on the merits of disputes between the railroads and their shippers. However, if the subcommittee believes that railroad shippers have been aggrieved, the remedy should be tailored to that particular problem. This could be done either by limiting the scope of the bill to transportation of property by rail or by amending section 20(11) to provide that carriers shall be liable for any decline in market value of property due to their failure to meet published schedules.

The vast majority of loss and damage claims against bus carriers are valid and are paid promptly. Differences of opinion may exist as to the amount of loss or damage, but the fact of liability is seldom contested. Since the plaintiff is bound to prevail in almost every case, his attorney would be entitled to a fee even though the amount of the judgment is no greater than what the carrier had previously offered to pay. In most instances, the plaintiff's attorney's fee would greatly exceed the amount of the judgment.

The economic impact of the proposed legislation on the bus industry would be substantial. Shippers and passengers would know (1) that the carrier is liable for some payment; (2) that, therefore, they could sue without cost; and (3) that in order to defend the suit, the carrier would be required to pay a fee to its own attorney and a fee to the plaintiff's attorney which, taken together, would far exceed the amount in dis-

pute. No matter how inflated the claim, it would almost always be cheaper for the carrier to pay it than to pay the fees of his attorney and the plaintiff's.

Under tariff provisions the maximum liability of motor carriers of passengers is $200 for express shipments and $250 for baggage. Most baggage, however, is transported for shippers who fail to declare value in excess of $50.

Mr. KUYKENDALL. Sir, would you yield here for a question?

Do you have available extra insurance for values above $200?

Mr. WEBB. No, sir, we do not.

Mr. KUYKENDALL. Thank you.

Mr. WEBB. As pointed out in our testimony on S. 858 in the last Congress, the average payments on baggage and express claims by Greyhound and Continental Trailways in 1966 ranged from $28 to $43. Thus, the practical effect of H.R. 9681 on loss and damage claims against bus operators would be to add to the carrier's admitted liability an additional liability of a few dollars up to more than $200, the exact amount being determined by its maximum liability under baggage and express tariff provisions. To provide for the allowance of attorney's fees in a multitude of small claims cases in which the plaintiff is bound to prevail and in which total legal fees will almost certainly exceed the amount of the judgment will simply provide a windfall for unscrupulous attorneys, which ultimately will be paid by the traveling public.

Mr. ADAMS. Would you yield again?

On page 2 of the prior statement, it indicated that under section 20(11) common carriers were not allowed to limit liability. Yet I notice here that you have limited liability, in effect, to $50. Is it that this section does not apply to that, or is it that if you don't declare a value of more than $20, you can't collect more than that?

Mr. WEBB. The provision is made in the section for limitation of liability under released rates.

Mr. ADAMS. Under released rates?

Mr. WEBB. Yes, that is right.

Mr. ADAMS. This section 20(11), in other words, says that you can't limit liability:

> . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation or any tariff filed with the Interstate Commerce Commission is hereby declared to be unlawful and void.

The prior statement indicates that applies to rails and that it applies to common carriers by truck, and interstate freight forwarders. Does it apply to you?

Mr. WEBB. It is really uncertain whether section 20(11) applies to transportation of passengers and their baggage, but it certainly applies to express shipments by bus. It does apply to property.

Mr. ADAMS. I see. In other words, you have indicated that for motor carriers the maximum liability is $200 for express shipments and $250 for baggage. That is provided within the act itself?

Mr. WEBB. Yes. Provision is made in one of the provisos of section 11 for the establishment and maintenance of rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property.

Mr. ADAMS. I have it now. In other words, you have a special rule applying to your particular situation.

Mr. WEBB. Yes, sir. That is under an order which requires approval by the Interstate Commerce Commission.

Mr. ADAMS. So if anything were to come out of this committee hearing on attorneys' fees, with obvious limitations of $50 or $250, you would need a special rule on attorneys' fees, wouldn't you?

If you are going to have a lawsuit limited to those amounts, you would have to have some kind of limit on fees?

Mr. WEBB. Our problem is simply this, Mr. Chairman. The nub of it is that all of the claims against our carriers are very small, but all of them are valid, because the fact of liability is rarely contested. It is a question of how much.

Was the damage $50, or it was $250? So the plaintiff is bound to prevail in such a case.

Mr. KUYKENDALL. Mr. Chairman, since we have interrupted his statement, and I think it is proper that we do here as we go along, you suggested that a situation exists in your industry that may give us an open door, Mr. Chairman, toward the problem that I have been struggling with.

What would you think about a proviso within the framework of S. 1653 that would say, not just for you, but overall, that no award may be made to attorneys unless the award by the court is 10 percent in excess of the offer made by the carrier before the litigation?

In other words, if they come in here and offer the same thing you offered in the first place, no attorney's fee may possibly be awarded.

Mr. WEBB. Yes. I think that would be a very fair amendment, Mr. Kuykendall, and as a matter of fact, we have indicated that we would be willing to accept a bill if it provided two things: First, that the judgment in the plaintiff's favor must exceed the amount offered in settlement by the carrier prior to the institution of the suit; and——

Mr. KUYKENDALL. I suggest 10 percent.

Mr. WEBB. We would not insist on that even.

But we think that would be an excellent amendment, and we also suggest no fee should be allowed to the plaintiff which exceeds the amount of the judgment which he obtained.

Mr. KUYKENDALL. That is one of the things that is up in the air. Thank you. Go ahead.

Mr. WEBB. Bus carriers have a strong incentive to be reasonable in settling small claims. They do not seek to discontinue or to curtail passenger service, but to increase it. The desire for continued patronage is incompatible with a highhanded claims policy. The bus industry is keenly aware of its obligations to passengers and shippers. We are not aware of widespread complaints about the handling of claims involving transportation of baggage and bus package express. If widespread complaints should arise, both the Congress and Interstate Commerce Commission can take appropriate action.

In fact, the Commission has instituted a proceeding—*Ex parte No. 263*—concerning the rules, regulations, and practices of common carriers, including motor carriers of passengers, in the handling of loss and damage claims. Initial statements have been filed by numerous carriers and shippers. In our opinion, action on the pending bill should be deferred until the Commission disposes of *Ex parte No. 263*.

At that time, the Congress will have more detailed information on the handling of loss and damage claims by carriers and will know what action the Commission has taken to remedy any problems found to exist.

If I might digress for just a moment, I would like to quote a few excerpts from *Ex parte 263.*

The Commission instituted the proceeding on January 29 of this year. The purpose of it is to inquire into the nature of existing rules, regulations, and practices of railroads, motor carriers, water carriers, and freight forwarders subject to parts I, II, III, and IV of the Interstate Commerce Act governing such carriers handling the processing of loss and damage claims by shippers and receivers of freight.

The order also provides that the purpose of the proceeding is to investigate the effect these carriers' rules, regulations, and practices have upon the adequacy of interstate or foreign transportation services, and the order further provides that the Commission will consider whether there should be adopted by this Commission just, reasonable, and lawful rules and regulations governing these and other matters relating to the general handling and processing of loss and damage claims.

If H.R. 9681 is favorably considered and applied to motor common carriers of passengers, we urge that the bill be amended to the form in which S. 858 was reported from the Senate Subcommittee on Surface Transportation in the last Congress (S. Rept. No. 1389, 90th Cong., 2d sess.). In other words, we urge (1) that the allowance of an attorney's fee be made a matter of judicial discretion; (2) that no such fees shall be allowed unless claims have been filed with the carrier and not paid within 90 days; (3) that no such fees shall be allowed unless the judgment rendered in the plaintiff's favor exceeds the amount offered in settlement by the carrier prior to institution of the suit; and (4) that no such fees shall be allowed to the plaintiff which exceed the amount of the judgment obtained.

Of the four amendments in question, the fourth is most important to the intercity bus industry. We cannot conceive it would be in the public interest to double or treble the loss and damage expense of bus carriers with the bulk of the increased expense attributable solely to the payment of legal fees and the honoring of extravagant claims.

For the reasons set forth above, Mr. Chairman, NAMBO respectfully requests that H.R. 9681 not be approved or, in the alternative, that it be reported with the safeguarding amendments adopted last year by the Senate Commerce Committee following its consideration of S. 858.

Thank you.

Mr. ADAMS. Thank you very much, Mr. Webb. I have asked my questions during the course of your statement. I appreciated your responses to those questions. It was an excellent statement, and we appreciate your coming.

Mr. Beardsley?

Mr. KUYKENDALL. Mr. Chairman, the young people sitting in the audience may wonder about the bells. We are in earlier session today, but until we have a quorum call, the members have discretion, if they so wish, to continue the hearing at least until we have a quorum call, and as long as the chairman and the minority member agree to continue, we may do so.

We are in session, and it may be broken into by the wish of either of us, or by a quorum call. So I want to explain to our audience what that means. We are going in at 11 a.m. today because we have a heavy schedule.

STATEMENT OF PETER T. BEARDSLEY, GENERAL COUNSEL, AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. BEARDSLEY. My name is Peter T. Beardsley, and I am general counsel of American Trucking Associations, Inc., 1616 P Street NW., Washington, D.C. ATA is the national trade association of the motor carrier industry, representing all types of motor carriers, with affiliated associations in every State and the District of Columbia.

As we understand it, the subcommittee has under consideration H.R. 8138 (Annunzio), H.R. 8609 (Foley), H.R. 9072 (Rogers of Florida), H.R. 9681 (Friedel), H.R. 14017 (Tiernan), and H.R. 17367 (Jarman). All of these bills would amend section 20(11) of the Interstate Commerce Act to provide that where action is brought to recover for loss or damage to property, a succesful plaintiff would be allowed, in addition, a "reasonable attorney's fee." The provisions of section 20(11) are made applicable to motor carriers by section 219 of the act, and to freight forwarders by section 413.

We understand the subcommittee is also considering S. 1653, as passed by the Senate. As so passed, it is less harsh than as introduced. Instead of its original provision, which, like the House bills, would require allowance of attorneys' fees in cases in which plaintiffs succeed in actions for loss or damage to goods shipped by rail or motor common carriers, or tendered to freight forwarders, it provides that the courts shall have discretion to allow such fees. In addition, it prohibits allowance of such fees where the plaintiff cannot show that he has filed claim with the carrier against whom suit is brought, which claim has not been paid within 90 days after receipt by the carrier or its agent. While we do not object to this provision, it offers small comfort, since actions against carriers cannot presently be brought unless claim has been filed with the carrier within the time specified in section 20(11), that is 9 months. *Delphi Frosted Foods Corp.* v. *Ill. Cent. R. Co.*, 188 F. (2d.) 343 (1951), cert. den., 342 U.S. 833 (1951).

In introducing S. 1653, Senator Magnuson stated that—

> The problems experienced by shippers of perishables in the handling of delay claims by the Eastern railroads, and the problems experienced by grain shippers in the handling of "clear record" cars by the Eastern carriers seem to be the most pressing (115 Cong. Rec. 7196).

But he also stated that S. 1653 "should provide some relief to householders on one of the important problems, the settlement of claims for damage." *Id.*, at 7197.

It should be noted that although Senator Magnuson referred only to "those few [household goods] carriers who believe they can thumb their noses at the moving public" (*ibid.*), the strong medicine embodied in the bills before you would be administered not only to the entire household goods moving industry, but to all segments of the regulated motor common carrier industry. It is ironic that while this proposed legislation is offered primarily to help small shippers of grain, and of fruits and vegetables, the vast bulk of the tonnage of

these commodities moving by motor vehicle is exempt from economic regulation by the Interstate Commerce Commission. This means that the bills will be of no help whatever to the great majority of shippers—small or otherwise—of these categories of traffic moving by motor vehicle.

Much of the claimed justification for this proposed legislation is that it will assist the "small shipper." Little or no thought seems to be given to the small carrier. Yet in 1969 about 77 percent (9,600 of 12,500) of the motor common carriers regulated by the ICC had annual gross revenues of under $300,000. These are the carriers with respect to whom enactment of the proposed legislation would be particularly severe. No carrier, large or small, should be unilaterally forced to run the risk of being held liable for attorneys' fees when he is required to defend an action—perhaps instituted by a large shipper—which he honestly believes is based on an unjustified claim.

We continue our opposition to S. 1653, as enacted by the Senate—as well as the House bills before you—because we do not believe that any legislation of this kind, one-sided in its application as it is, is fair and equitable to regulated motor common carriers. The bills allow a shipper or consignee to press a claim against a carrier, even to the extent of taking the matter to court, knowing that if the court sides with the carrier the claimant will suffer no penalty. On the other hand, the carrier, even in the case of what he honestly believes to be a highly doubtful claim, incurs the risk that should the action go against him, he will suffer, in addition to the damages assessed, an added money penalty of varying but uncertain amount.

These bills would allow recovery of an attorney's fee, not only by small shippers, but by the giant shippers of the country, including the United States, the largest shippers of all. And you can be sure that just as in the case of the reparations provisions of the law, it would be the large shippers—not the small ones—who would be the chief beneficiaries of the one-way windfall which these bills would provide.

The Supreme Court recently set forth the distinction between the English and American systems with regard to allowance of attorney fees. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717–718 (1967), the Court said:

> As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special "taxing Masters" in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client.
>
> Although some American commentators have urged adoption of the English practice in this country, our courts have generally resisted any movement in that direction. The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in Arcambel v. Wiseman, 3 Dall. 306, 1 L.Ed. 613 (1796), and adhered to it in later decisions. (Citing cases.) In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their

rights if the penalty for losing included the fees of their opponents' counsel. (Citing cases.) Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration. Oelrich v. Spain, supra, 15 Wall. at 231. (Footnotes omitted.)

In citing the *Fleischmann* decision, I am not, of course, suggesting that Congress does not have power to enact this proposed legislation. There can be no question on that score. Rather, I am simply trying to establish that enactment of the bills before you would run counter to the tradition in this country, one which, I submit, is based on better policy than the English system.

If all carriers were large and all shippers small—and that is the picture that proponents of this legislation seem to want to establish—that would be one thing. It could then be argued with some forces that, technicalities aside, shippers simply could not contend with carriers in the field of loss and damage claims. But that is not the fact. For every large carrier there are literally dozens of large shippers. In the motor carrier field, for example, there are 11 companies whose gross income exceeds $100 million per year. On the other hand, there are, according to Fortune magazine (May and June 1970), 689 industrial corporations whose gross income exceeds that figure. Thus, there is no valid basis for the discrimination inherent in the proposed legislation.

It is interesting to note that in this very session of Congress, legislation was enacted to protect consumers by providing a civil remedy for misrepresentation of the quality of articles composed wholly or partly of gold or silver. I refer to Public Law 91–366. This law, among other things, allows successful plaintiffs to recover attorney fees when they can establish that articles they have purchased were falsely marked as to their precious metal content. But the law, like the English system, cust both ways. When the suit is unsuccesful, the defendant is also allowed to recover attorney fees. In commenting on this aspect of the bill—H.R. 8673—which was enacted into the law referred to, Chairman Staggers stated:

The bill includes recovery of suit costs and attorney fees by either party and this should discourage lawsuits which are not based on sound evidence. [116 Congressional Record H6399 (daily ed. July 7, 1970).]

We agree completely with the chairman's reasoning, and submit that it is equally applicable here. If these bills you are considering are enacted without affording successful defendants the same degree of relief as successful plaintiffs, you can be certain that much litigation will result which is "not based on sound evidence."

The Interstate Commerce Act already provides that common carriers—rail or motor—shall be liable for any loss, damage, or injury which they cause to property shipped in interstate commerce. This, of course, includes damages resulting from unreasonable delay, and I should stress which they cause. There has been fairly loose talk here about the responsibility, I think, of common carriers. They have to cause the damage.

By the same token, the law, as it is administered by the Interstate Commerce Commission, requires that carriers may not pay damage claims, whether arising from delay or otherwise, without an investigation to ascertain whether the loss or damage involved was, in fact, caused by the carrier. A carrier which—almost as a matter of course—

paid damage claims lodged with it would, no doubt, have a satisfied shipper clientele. But, in addition to paying out an unreasonably high portion of its revenues in claims, it would very likely find itself charged with violating the law for its failure to use due care in conducting its investigation with respect to such claims. The reason that carriers are required to confirm their liability before payment of loss or damage claims is to prevent such payments from becoming a form of rebate to favored shippers.

There are many instances of loss or damage claims filed with motor carriers which, after investigation, are found to be valid and are paid by the carriers. In 1969, 79 motor common carriers of general freight with gross revenues of $2.3 billion paid a net total of $39.9 million in freight claims, or 1.73 percent of their gross revenue. Over 70 percent of these claims were settled in 30 days or less and over 89 percent in 90 days or less. The average claim paid amounted to $46.43.

These figures are taken from the annual report of ATA's National Freight Claim Council, which is appended to this statement. They belie any assumption that motor carriers refuse to pay small freight claims because they know that the cost of recovery to the shipper, under the present state of the law, makes court relief practically unavailable. But in the vast majority of disputed cases—and those are the ones to which these bills would apply—there is a genuine conviction, on the part of both shipper and carrier, that the claim is valid or invalid, respectively. There are numerous decisions of both Federal and State courts dealing with loss and damage claims by shippers against carriers. The decisions go both ways. In some instances the shipper has prevailed, in others the carrier. Cases of this kind wouldn't ordinarily reach the courts unless each party to the action genuinely believed in the justice of his cause. Yet the House bills and S. 1653 would unfairly penalize only the carrier for having the courage of his convictions.

This proposed legislation would put motor carriers in a serious quandary. If they do not pay claims which they feel are unjustified, they will incur the risk of not only paying damages but of having such damages increased by a "reasonable attorney's fee." Since the bills do not relate the size of the fee to the amount of the claim involved, there would, no doubt, be cases in which a reasonable attorney's fee, depending on the difficulty of proving the case, could well be more than, or even several times as much, as the damage involved.

For example, it would not be unlikely that a case might result in an award of only $150 damages, but a $500 attorney's fee. This, in turn, would be likely to result in increased litigation, in that claimants for relatively small amounts would often be able to find attorneys willing to take their cases on a contingent fee basis. Thus, claimants with poor cases would have nothing to lose by instituting court proceedings. This, in turn, would lead to harassment of motor carriers by some shippers, in an effort to collect damages for unfounded claims, and result in instances of legal blackmail in which motor carriers, particularly the smaller ones, would pay claims they felt were unjustified rather than run the risk of paying an attorney's fee equal to or greater than the loss or damage involved.

In the absence of a special statute so providing, it is elementary in American jurisprudence that counsel fees are not recoverable by a

successful litigant. The time, effort, and money expended are simply the consequences of defending or maintaining every suit. *Luckett* v. *Cohen*, 169 F. Supp. 808, 809, S.D.N.Y. (1956). No real justification has been advanced for the proposal to add an attorney's fee to any recovery for loss or damage to property moved in interstate commerce by regulated motor common carriers. This being so, if such carriers are to be required to pay attorneys' fees to shippers who succeed in loss or damage litigation against them, equity requires that claimants who put motor carriers to the expense of defending unjustified claims should be required to pay the carriers an attorney's fee.

Justice demands fair treatment for both parties to the contract of carriage. We therefore request that if this proposed legislation is favorably reported by the subcommittee, it be amended to reflect this aim.

Finally, as some of the other witnesses have, I would like to call the subcommittee's attention to the fact that there is a proceeding now underway before the Interstate Commerce Commission (*Ex parte No. 263*), in which the agency will inquire into the rules and practices of regulated carriers and freight forwarders with respect to processing of loss and damage claims, and determine whether or not the agency should promulgate rules to govern the handling of such matters by the carriers and forwarders.

Initial statements will be filed September 30, 1970, by interested parties, and reply statements are due November 10, 1970. While I cannot predict the ultimate outcome of this proceeding, the subcommittee may wish to consider the desirability of postponing action on the bills here until the Commission has acted in *Ex parte No. 263*.

Thank you, Mr. Chairman and Mr. Kuykendall.

(The attachment referred to follows:)

AMERICAN TRUCKING
ASSOCIATIONS, INC.
1616 P STREET, N.W. WASHINGTON, D. C. 20036
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ANNUAL REPORT - CALENDAR YEAR 1969

LOSS AND DAMAGE CLAIMS PAID, BY CAUSES AND COMMODITIES

This report is compiled from and summarizes the total loss and damage claim experience of 79 motor common carriers of general commodities, who have voluntarily cooperated in this project. Ranging in size from less than $280,000 to almost $252 million gross revenues, the contributing carriers are well distributed, geographically, throughout the continental United States. The total revenue of these carriers was more than $2.3 billion, 33 percent of the estimated total revenue for the year 1969 of all (5560) such carriers.

The reporting carriers paid out $39,850,012 directly to claimants for loss, damage and delay. This is 1.73 percent of the reported gross revenue for the year, and does not include insurance premiums, handling, processing and settlement of claims, administrative and executive overhead expense, or the very substantial cost of personnel selection and training, educational, or claim prevention programs. These indirect and hidden expenses have been variously estimated by experts in the field at from two to five times the dollars paid out directly to claimants.

If the claim payments reported herein are considered to be an accurate indicator of the experience of the entire regulated motor carrier industry, having an estimated $13.3 billion total revenue, a projection of the "national claim ratio" produced herein would lead to the conclusion that the industry paid out approximately $229 million for loss and damage claims in 1969. Only slightly more than one shipment in each hundred resulted in a claim.

A comparative summary of loss and damage claim experience for the past three years will be found on page 3 of this report.

REGINALD C. G. WITT, Executive Secretary
A.T.A. National Freight Claim Council

April 1, 1970

LOSS AND DAMAGE CLAIM STATISTICS FOR CALENDAR YEAR 1969

79 Reporting Carriers — Year 1969

Code	Commodity Description	A Shortage	B Theft or Pilferage	C Delay	D Concealed Damage	E Visible Damage	F Heat or Cold	G Water Damage	H Wreck, Fire, Catastrophe	I Total Claims Paid	J %	K Revenue	Code
1	Agricultural Machinery, Implements, Parts	$ 30,980	$ 1,013	$ 727	$ 30,329	$ 73,203		$ 3,619	$ 4,480	$ 165,551	.29		1
2	Aircraft, Missiles, Parts	20,988	2,004	19	3,834	14,130		11	17,140	60,195	.13		2
3	Alcoholic Beverages	15,950	188,497	39	3,323	61,090	$ 1,347	3,301	5,447	279,441	.63		3
4	Animal Feeds, Medicines, Bird Suppl., Insecticides, Fungicides	17,651	923	1,080	4,650	116,903	2,730	5,082	1,775	150,848	.40		4
5	Automobile Parts, Accessories	752,980	140,713	401,471	73,300	577,148	147	38,994	145,240	2,136,753	4.52		5
6	Batteries, All Kinds	68,073	4,739	401,030	22,330	78,060	300	5,408	1,041	580,030	1.23		6
7	Boats, Accessories, Parts	9,021	1,992		3,971	7,467		45	523	23,689	.05		7
8	Building or Paving Material	388,150	3,902	7,073	123,790	740,433	4,036	16,081	50,358	1,149,673	2.43		8
9	Cameras, Photo Materials, Accessories, Optical Goods	117,448	128,401	536	9,105	30,727	69	4,407	14,515	312,161	.65		9
10	Candy, Confectionery, Bakery Goods	273,710	38,218	32,190	32,100	235,913	48,019	10,501	29,080	706,801	1.49		10
11	Chemicals, Liquid or Dry	202,908	4,375	2,264	11,326	400,431	33,576	15,953	38,504	763,389	1.62		11
12	Cleaning Compounds, Bleaches, Detergents, Soaps	275,475	4,679	1,004	16,736	329,108	26,304	23,906	3,967	683,730	1.45		12
13	Clothing	2,609,067	1,733,234	79,676	33,736	269,683	1,030	99,721	124,564	5,028,339	10.63		13
14	Dangerous Articles—Explosives, Corrosives, Flammable, Acids	26,112	7,706	310	1,250	12,033		1,673	2,391	51,964	.11		14
15	Drugs, Medicines, Medical Supplies	298,910	93,448	6,952	13,620	205,500	31,414	13,374	40,713	595,951	1.26		15
16	Electrical or Electronic Supplies, Equipt., Fixt., Instr., Appl., Parts	811,611	155,108	7,420	274,060	830,871	277	92,826	71,616	2,195,957	4.64		16
17	Floor Covering or Tile, Hard Surface	20,214	1,010	2,090	10,553	29,236	428	4,820	4,800	72,540	.15		17
18	Floor Covering, Soft Surface, Rugs, Carpeting, Etc.	315,626	23,730	11,003	68,792	520,110	75	26,500	17,233	1,018,126	2.15		18
19	Food Products, Canned, Dried, Preserved	605,308	9,523	10,134	34,062	873,094	80,710	63,002	34,039	1,706,955	3.61		19
20	Food Products, Fresh	24,367	996	14,066	2,173	34,738	18,964	8,760	7,455	113,507	.24		20
21	Food Products, Frozen or Refrigerated	83,060	4,336	3,103	30,791	78,277	63,412	8,991	1,800	252,682	.53		21
22	Furniture or Parts	225,310	3,377	3,101	616,251	750,313	31	13,757	8,976	1,621,407	3.49		22
23	Glass or Mirrors	59,047	2,017	836	168,701	605,324	66	4,923	18,450	865,417	1.41		23
24	Glassware, Earthenware, Chinaware, Crockery	101,616	3,126	1,160	170,344	175,560	8	3,863	7,257	523,987	1.13		24
25	Hardware and Tools Other than Power	625,956	22,768	3,203	65,037	342,475	116	23,130	51,934	1,073,653	2.27		25
26	Household Goods, Personal Effects	140,024	21,630	2,504	22,674	51,011	1,060	1,451	3,466	251,027	.53		26
27	Lamps, Shades, Parts	122,948	3,032	4,133	132,675	247,331	1,637	3,020	11,298	583,795	1.23		27
28	Luggage, Purses, Leather Products	171,063	21,906	790	10,080	52,634		7,607	1,050	175,208	.37		28
29	Machinery—Office or Business	168,654	37,442	3,519	94,370	195,167		3,819	20,965	545,140	1.15		29
30	Machinery and Power Tools	522,119	93,998	17,437	338,569	1,107,045	13	18,207	236,544	2,253,128	4.77		30
31	Marble, Stone Products	18,082	3,794	60,936	37,920	94,206	31	1,329		227,297	.48		31
32	Metal Sheet, Castings, Forgings, Stampings, Fabrication	219,453	61,163	8,710	97,551	533,132	1,140	91,008	37,475	1,049,130	2.22		32
33	Metal Products, Finished, or Parts	743,481	41,999	23,019	248,135	1,083,237	866	79,712	118,906	2,337,907	4.94		33
34	Oil, Grease, Petroleum Products	48,007	220	333	4,404	71,650	1,869	773	6,162	140,108	.30		34
35	Paint, Varnish, Pigments, Dyes, Ink	240,752	2,424	632	90,603	416,120	33,462	3,730	37,406	770,108	1.63		35
36	Paper and Paper Products	457,407	3,790	11,737	55,180	487,030	3,114	202,403	19,409	1,246,070	2.62		36
37	Plastic or Rubber Articles	484,320	20,877	7,402	80,574	406,050	3,330	27,074	62,636	1,092,263	2.31		37
38	Plastic or Rubber, Unmanufactured	77,417	1,673	312	14,314	166,940	10,000	3,047	38,021	312,232	.70		38
39	Plumbing Fixtures, Supplies	116,912	14,783	2,117	160,026	288,137	59	406	8,630	501,534	1.06		39
40	Printed Matter	164,227	13,234	14,540	10,771	111,240	1,317	47,587	33,203	396,133	.84		40
41	Radios, Phonographs, Televisions, Recorders, Amplifiers, Parts	737,750	440,912	3,352	237,006	307,610	46	18,802	33,409	1,713,113	4.05		41
42	Refrigerators, Air Cond., Cooling, Heat., Washers, Equip., Parts	142,861	37,790	2,040	233,636	421,648		3,721	35,830	966,913	2.04		42
43	Shoes, Shoe Findings	384,142	141,616	3,035	7,480	87,677	30	11,301	21,687	659,130	1.34		43
44	Stoves, Washers, Dryers, Freezers, Parts	130,021	6,038	3,340	305,475	557,300		5,361	47,023	1,142,061	2.42		44
45	Tires and Tubes, Rubber or Synthetic	374,230	71,022	751	3,203	68,039	12	1,633	16,871	699,359	1.48		45
46	Textiles—Fabrics or Piece Goods	847,441	127,718	19,368	17,230	384,505		123,968	75,634	1,307,835	2.77		46
47	Textile Products, Finished, Other than Clothing	493,074	36,424	5,021	3,022	30,508		33,080	9,171	758,030	1.04		47
48	Textile Yarns, Fibers, Etc.	69,179	1,513	735	3,114	106,656	87	14,536	115,111	310,711	.66		48
49	Tobacco and Products	190,159	234,569	2,954	10,943	125,717	91	65,560	29,067	618,050	1.31		49
50	Toilet Preparations, Cosmetics	341,523	50,753	5,447	13,283	183,363	46,420	9,701	4,594	665,678	1.41		50
51	Toys, Sporting Goods, Playground Equipt.	515,056	100,575	3,752	34,443	170,751	498	19,828	28,462	915,751	1.93		51
52	Wire, Cable, Cordage, Rope	116,577	32,518	1,752	19,965	229,141	2,357	6,873	36,347	443,620	.94		52
53	U.S. Government Freight, All Kinds	257,033	2,153	580	12,690	33,763	3,243	3,127	10,000	330,021	.70		53
54	Miscellaneous, Not Otherwise Indexed Above	1,083,517	152,237	33,442	280,049	829,196	36,171	137,461	30,328	2,646,423	5.60		54
55													55
56													56
57													57
58													58
59													59
60													60
	Total by Cause	$17,301,330	$4,270,703	$1,299,036	$4,341,058	$16,052,728	$489,047	$1,118,793	$3,095,314	$47,383,149	100%		
	Ratio to Total Claims Paid	36.53	9.03	2.74	9.18	33.95	.87	2.21	6.48	100%			

Total Columns A-B-C	$22,866,153	Total—Cols. D-E-F-G-H	$24,616,190 / $47,283,549
		Salvage	$ 7,403,597 / $ 7,403,597
Net Claims Paid	$22,866,153	Net Claims Paid	$16,963,253 / $39,630,012
Ratio to Total Revenue	.99	Ratio to Total Revenue	.74 / 1.73

Number of Claims:

On Hand at First of Year	101,290
Received During Year	928,349
TOTAL	1,029,641
Settled During Year	907,642
On Hand at End of Year	121,999
Average revenue per claim paid	$ 2,480.20
Average amount paid per claim	$ 56.48

Number of Claims Settled:

In 30 days	656,711	72.35 %
In 30 to 90 days	146,462	16.34 %
In over 90 days	104,467	11.51 %
Total	907,642	100.00 %
Shipments Handled in Calendar Year		85,107,410
Percentage Resulting in Claims		1.06
Gross Revenue		$ 2,300,221,242
Claim Ratio		1.73 %

COMPARISON OF CLAIM PAYMENTS
1967 - 1968 - 1969

	1969	1968	1967
Reporting Carriers	79	94	77
Total Revenue	$2,300,220,242	$2,183,897,000	$1,898,643,870
Shipments Handled	85,597,410	82,822,536	81,824,213
Number of Claims Paid	907,642	790,851	770,005
Claim-Free Ratio	98.94%	99.07%	99.06%
Average Revenue Per Claim	$ 2,680.20	$ 2,935.19	$ 2,634.49
Average Amount Paid Per Claim	$ 46.43	$ 43.48	$ 38.89
Claims Paid in Less Than 30 Days	70.15%	71.36%	73.85%
Total Claim Payments	$ 47,283,549	$ 37,918,571	$ 33,846,441
Salvage Recovery	$ 7,433,537	$ 5,561,425	$ 5,818,491
Net Claim Payments	$ 39,850,012	$ 32,357,146	$ 28,027,950
Ratio of Claims Paid to Revenue	1.73%	1.48%	1.47%
PERCENTAGES OF TOTAL CLAIMS PAID-8 PRINCIPAL CAUSES			
Shortages	36.59%	34.13%	34.67%
Theft-Pilferage	9.03%	7.67%	6.13%
Delay	2.74%	.91%	.94%
Concealed Damage	9.18%	13.04%	14.17%
Visible Damage	33.95%	34.98%	34.40%
Heat or Cold	.87%	.95%	.93%
Water Damage	3.21%	3.59%	3.96%
Wreck, Fire, Catastrophe	4.43%	4.73%	4.80%
PERCENTAGES OF TOTAL CLAIMS PAID-6 PRINCIPAL COMMODITIES			
Clothing	10.63%	9.28%	8.03%
Household Appls., Including Radios, T.V.s, Phonos, Refrigs, Air Conds,	6.09%	7.06%	6.36%
Machinery and Power Tools (Inc. Offc. Machy.)	5.93%	6.24%	5.98%
Metal Products, finished, or Parts	4.94%	4.41%	4.80%
Electrical or Electronic Supp., Equipt., Parts	4.64%	5.29%	5.54%
Auto Parts, Accessories	4.52%	3.65%	3.83%

Mr. ADAMS. Thank you very much, Mr. Beardsley. I am a little confused by your statement on page 3, where you indicate that this legislation would not apply to small shippers of grain, fruit, and vegetables and so on.

Of course, the Senate report refers to the fact that this is one of the reasons for the bill. In checking section 20(11) here, I find that there is a flat provision making common carriers liable for such losses with the exception of ordinary livestock.

Would you clarify that for me please? I know that agricultural shipments are exempt from general economic regulations of the Board so far as certificates of convenience and necessity are concerned. I know they are in special categories so far as carriage are concerned, but I thought that rules of safety, et cetera, applied to them.

As I look at this statute, it seems to me that the rules, perhaps, on loss and so on would apply to them even though economic regulations do not. Would you clarify it please?

Mr. BEARDSLEY. I hope so, Mr. Chairman.

Section 203(b) reads this way starting out, and I won't read the whole thing:

> Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall be construed to include

and then it goes along with a whole lot of subnumbers, of which No. 6 exempts from everything except the safety provisions vehicles transporting so-called agricultural commodities, of which grains and fresh fruits and vegetables are two.

So that none of the economic provisions, and that includes the provisions of section 20(11), have any application.

Mr. ADAMS. Are there any court cases, regulations, or anything else that have come down that have determined that?

Mr. BEARDSLEY. I don't think so. I will say this, because I don't want to leave any confusion here.

There is no prohibition against a motor carrier filing tariffs and handling commodities which are otherwise exempt. This exemption is construed by the Commission and the courts as only being applicable when the carrier is handling a full truckload of such commodities. If you can imagine a truck half-loaded with iron and steel and half-loaded with apples, under the regulations the apples then would be subject to regulation.

Mr. ADAMS. What about if you had carried, as you frequently do, your regulated commodities to the West, and you are coming back with a full load of agricultural commodities?

Mr. BEARDSLEY. That makes no difference. The exemption goes to the vehicle, not to the carrier.

Mr. ADAMS. In other words, you are still regulated, with the exception of——

Mr. BEARDSLEY. You would still be covered by the safety regulations when you are transporting agricultural commodities in full loads, but nothing else.

Mr. ADAMS. Can you move outside your certificate?

Mr. BEARDSLEY. Yes, you can, and you can make your rates right on the shipper's doorstep, like the gypsies who haul these commodities do.

Mr. ADAMS. My final question is, what is the practice within the

industry if, for example, you are backhauling, we will say, agricultural products?

The reason I ask this is that apparently this is a genesis of the Senate bill, according to the statement that you have placed in the record here, and you lose it, the wheat or apples or whatever it is. Do you insure these shipments, or does the farmer insure them, or is it just too bad?

Mr. BEARDSLEY. Could we talk about insurance generally?

Mr. ADAMS. I want to stay on that commodity. I assume otherwise you use other practices.

Mr. BEARDSLEY. Let us assume, for example, that a large carrier, while he would not be subject to regulation, economic regulation, when he was hauling full truckloads of apples or any other agricultural commodity, he is substantial enough that nevertheless he has made a contract with the shipper.

I am certain that if, due to his negligence, the shipment of apples, or asparagus were lost, I think he would end up paying the shipper for it.

Mr. ADAMS. I see. But there is nothing within the statute that requires it as it does with other commodities?

Mr. BEARDSLEY. Not the statute as such; no.

Mr. ADAMS. Thank you very much.

Mr. Kuykendall?

Mr. KUYKENDALL. In your discussion, and that of the prior witness, you have left the impression here that you feel this legislation should have been directed almost entirely toward rail transportation; is this correct?

Mr. BEARDSLEY. I did not want to put it quite that way, Mr. Kuykendall, but I do think that the rationale has been expressed, and the only rationale I have seen for this has been Senator Magnuson's statements, and he certainly laid these problems at the door of the railroads.

I find it kind of ironic that if the railroads are causing this problem that we are dragged in by the heels, and I find it particularly ironic when we are talking about the commodities that Senator Magnuson was referring to, because those are exempt from economic regulation, and this doesn't mean much anyhow in the motor carrier field.

Mr. KUYKENDALL. Let me get to the four amendments Mr. Webb proposed, and let me paraphrase them.

You brought out one that I have been trying to figure out for 2 days how to get at, and that is the matter of making this attorney's fee a two-way street.

I had questioned Mr. Webb before he read his own amendment, and it looked like our minds were in the same channel, when I had suggested that no attorney's fee could be awarded unless the award was greater than the award made by the carrier prior to the litigation.

I suggested maybe it should be a certain percent in excess so you couldn't add a nickel and collect an attorney's fee. I know how I feel about that, and obviously you feel the same.

Now, the matter of sound evidence, I questioned the first witness about this, and do you agree—well, obviously you do, because you used the term "sound evidence"—that this particular criteria, that the case must have been based on sound evidence, and I would like to add "and no award at all has been made" and under those circumstances the defendant may collect reasonable attorneys' fees.

Now, lastly, and here is where I can't quite buy the fourth amendment offered by Mr. Webb, but I also am sympathetic with part of the reasoning here.

He said that the legal fees should under no circumstance exceed the amount of the claim. Well, what about this type spirit, maybe in the legislative report, that the awarded legal fees must have a quantitative relationship to the size of the claim, but is not tied specifically to it.

Would that be of—I know you would like to have the whole apple here and part of it, but do you think that the court would be bound by such language to give a different legal fee on a $50 claim than a $1,000 claim with that language, that the fee must have quantitative relationship to the size of the claim?

Mr. BEARDSLEY. It seems to me that most courts would consider that that meant something. I am not sure——

Mr. KUYKENDALL. Are you an attorney, Mr. Beardsley?

Mr. BEARDSLEY. Yes, sir.

Mr. KUYKENDALL. What do you think it would mean?

Mr. BEARDSLEY. Let me be the judge for a minute. I would not take your language, as contrasted to Mr. Webb's, to mean that I could not allow a higher attorney's fee than the amount of the claim, but I would think that I was bound to try to maintain a reasonable relationship.

I would not be surprised today, as I pointed out in my testimony, and I took what I considered as a fairly modest figure. You could have a very difficult proceeding over a relatively small claim, and a court might well be inclined to say, "Well, I don't care if the recovery is ony $100. There was a lot of work done here, and I am going to allow a thousand dollars."

I think your language would tend to restrict him from doing that. Of course, Mr. Webb's language would restrict him completely from doing that, but maybe in your case a court that was otherwise inclined to say that because of the difficulty of the case, it was going to allow a $1,000 on, say, a $100 claim, might say that he would allow, because of this language, $400.

That is off the top of my head.

Mr. KUYKENDALL. Thank you, Mr. Chairman.

Mr. ADAMS. Thank you, Mr. Kuykendall.

Thank you very much, Mr. Beardsley. I have no further questions, and I appreciate your clarification on the exempt commodities.

Mr. BEARDSLEY. Thank you, Mr. Chairman.

Mr. ADAMS. We have three witnesses left: Mr. Breithaupt, Mr. Wiley, and Mr. Hennessey.

Gentlemen, we have been trying to determine when we could come back today to complete these hearings, and Mr. Kuykendall and I can return at 4 o'clock.

If you gentlemen would prefer to put in your statements, we would, of course, be willing to have you do that. We are sorry about the inconvenience of it, but we have the high-speed transportation bill on the floor now, and we have the hijacking bill on the floor now. They both come out of this subcommittee, and we just really can't make a commitment before about 4 o'clock this afternoon. Three bells have rung now, which we have to go over and answer.

So, Mr. Breithaupt, whichever you would prefer. Do you wish to return at 4, or do you wish to put in your statement?

STATEMENT OF HARRY J. BREITHAUPT, JR., GENERAL SOLICITOR, ASSOCIATION OF AMERICAN RAILROADS

Mr. BREITHAUPT. Mr. Chairman, and Mr. Kuykendall, this matter is of concern and gravity to my industry, and speaking for myself and the other two witnesses on the list, we would prefer to return at 4, as opposed to filing our statements, or at such other time as would be convenient to the subcommittee.

Mr. ADAMS. What we worry about is, if we don't do this on the day we are here, it may drag on and then it becomes difficult to you gentlemen. Why don't we do this at 4 o'clock then this afternoon, and we will be here and available, and if at that time you are here, we will proceed with hearing the remaining witnesses, Mr. Breithaupt, Mr. Wiley, and Mr. Hennessey.

With that, this committee is recessed until 4 o'clock this afternoon.

(Whereupon, at 11:35 a.m. the subcommittee recessed, to reconvene at 4 p.m. of the same day.)

AFTER RECESS

(The subcommittee reconvened at 4 p.m., Hon. Brock Adams presiding.)

Mr. ADAMS. We will come to order.

This is a continuation of the hearings which we adjourned this morning. I have listed as remaining three witnesses, Mr. Breithaupt, Mr. Wiley, and Mr. Hennessey.

Are Mr. Wiley and Mr. Hennessey here also?

Mr. Breithaupt, we have a copy of your statement, which, as I have indicated before, you may either read or summarize, whichever is your preference.

Mr. BREITHAUPT. My name is Harry J. Breithaupt, Jr. I am general solicitor of the Association of American Railroads, with headquarters at Washington, D.C. My appearance here today is by authority of the association's board of directors, and is for the purpose of expressing the views of the association and its members on H.R. 8138, H.R. 8609, H.R. 9072, H.R. 9681, H.R. 14017, and S. 1653, bills "to amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property."

The association, speaking for its member railroads, opposes these bills. Let me explain why.

In our system of jurisprudence, it is the general rule that plaintiffs—even when they are successful in litigation and thus prevail over defendants—are not entitled to recover their attorney's fees, either as part of the costs or as an element of damages. I have cited some authorities in appendix A. There are exceptions, but they are not applicable here.

Some of the exceptions are statutory, and I shall describe those, and distinguish them, later. Other exceptions to the general rule are contractual, reflecting agreement between the parties to a particular transaction. Then there are a few additional exceptions, neither contractual nor statutory, such as fraud, malice, wanton negligence, et cetera, but none of them is applicable here.

Obviously, claims for freight loss and damage are not within any of the exceptions to the general rule. This follows, else the proponents of these bills would not be urging the Congress, through their enactment, to create a special statutory exception to the general rule.

I want to make it clear to the subcommittee that what is sought here would indeed be an exception to the general rule. These bills would provide for the recovery of attorney's fees in a class of cases—or a type of case, if you will—where it is not generally thought appropriate to apply such a rule as is here suggested.

We do not believe that it would be appropriate or within the exercise of sound legislative judgment for the Congress to create a special exception to the general rule in the case of litigation involving controversies between shippers and carriers as to the carriers' liability for freight loss or damage.

The scales of justice are already heavily weighted in favor of claimants who go to court in suits brought against carriers on claims of this kind. I doubt that any useful purpose would be served by attempting to review on this occasion the law of freight loss and damage claims. Lengthy books have been published on the subject. A good one is Miller, Law of Freight Loss and Damage Claims (Sigmon's ed. 1967). To summarize, however, it would not be a true statement to say, even speaking generally, that carriers are absolute insurers of the property they transport, or that they are unconditional guarantors of certain standards of service, but the legal principles that are applicable do impose very substantial obligations upon them. This has been so since the earliest days of our Common Law.

But my statement as to the scales being already weighted in favor of shippers and against the carriers is not occasioned by the nature of the basic and underlying legal principles of carrier duty, and carrier liability for breach of that duty, alone. I have more particular reference to such matters as the burden of proof in cases involving freight loss and damage. It is a comparatively simple and easy matter for a claimant to establish a prima facie case against the carrier, and then the burden of proof—often found to be a very difficult one—rest upon the carrier to exonerate itself.

I am not an expert in this branch of law, and hence am qualified to speak only in these generalities, but let me illustrate my point with a case in point. In a fairly recent, and the most recent, leading case on this subject the Supreme Court was called upon to resolve a controversy involving damage to a carload of melons.[1]

The fruit shipper had sued the railroad in a Texas court. The jury found that the melons were in good condition at the time they were turned over to the railroad at Rio Grande City, Tex., but that they arrived in damaged condition—spoiled, decayed—at their destination in Chicago. The jury also affirmatively found that the railroad defendant and its connecting carriers had performed all required transportation services without negligence. This the carrier, then, had proved.

The State court concluded, in view of the jury's findings, that although a common carrier is not responsible for spoilage or decay which is shown to be due entirely to the inherent nature of the goods, the railroad defendant had not established that the damage was caused

[1] *Missouri Pacific Railroad Co.* v. *Elmore & Stahl*, 377 U.S. 134 (1964).

solely by natural deterioration. The Supreme Court of the United States granted certiorari, and in its opinion said that section 20(11) of the Interstate Commerce Act, which has been cited innumerable times before you in the last few days, making common carriers liable for the full actual loss, damage, or injury caused by them—

> . . . codifies the common-law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods.[2]

So far, merely codification of the common-law rule, the Court said. But the Supreme Court went on to hold, however, that—

> . . . under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.[3]

The inherent nature of melons being what it is, one would suppose that once the carrier proved affirmatively—to the satisfaction of the jury—that it and its connecting carriers had performed all of the required transportation services, and has done so without negligence, it would be absolved of responsibility for the spoilage and decay. But no.

The burden of proof is quickly and decisively shifted to the carrier in "delay" cases, too. Carriers are required to transport property with reasonable dispatch, which is said to mean "without unreasonable delay." Fair enough. But what constitutes "reasonable dispatch" or "unreasonable delay"? That is a question of fact, obviously, and the parties are not always able to agree. Reasonable men may well differ. If they do, lawsuit may ensue. In that event—

> The claimant—the shipper—has the burden of proving that the carrier failed to deliver the goods within a reasonable time. Claimant must establish that a longer time was consumed than should have been necessary to complete the transportation. A prima facie case of negligent delay is established when evidence of unusual delay is adduced, and the burden is then on the carrier to show [affirmatively] an excuse for the delay which cannot be attributed to its own negligence or that of its employees.[4]

Gentlemen, perhaps this is not unreasonable, either. It does seem unreasonable, however, to propose that attorneys' fees be awarded the claimant just because he manages to prevail over the defendant in a lawsuit of this kind, between reasonable adversaries.

In any case, shippers do already have substantial advantages over carriers in the prosecution of freight loss and damage claims, advantages they enjoy without the one-sided benefit that would also be theirs if one of these bills before you should become law. The problems thereby created for the railroads vary from circumstance to circumstance, from claim to individual claim. The bases for assertion of loss and damage claims are numerous. One is tempted to say that they are virtually without number.

I would guess that in the case of perishables the predominant claims are for market value decline, based upon delay, and for spoilage, based

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[2] Id., 137.
[3] Id., 138.
[4] Miller, Law of Freight Loss and Damage Claims (Sigmon's ed. 1967, p. 191).

upon faulty handling or delay, not necessarily in that order. In the case of grain shipments, about which you have been hearing, there is a different set of problems. I understand that they revolve, in large part, around allegations of loss in transit. They involve the weighing process, and weights, at origin and destination.

Before I leave the matter of advantages, if I may so label them, that claimants already have when it comes to obtaining redress for freight loss or damage, there is another very important feature of carrier liability which I feel compelled to mention. It is this: Under the Interstate Commerce Act, not only is the initial—or origin—carrier liable for any loss, damage, or injury to property it may have caused. The delivering carrier is similarly liable, and, furthermore, both the initial and the delivery carrier are made liable for loss, damage, or injury by any carrier "over whose line or lines such property may pass." (Sec. 20(11)).

Thus one claiming freight loss or damage may make demand upon, and proceed against, either the initial carrier or the delivering carrier, and both are liable not only for loss, damage, or injury occurring while the shipment is in its own possession, but even for that damage which occurs when it is in the possession of a connecting line, or any of several connecting lines.

Of course, the initial or delivering carrier making payment of a claim is:

> Entitled to recover from the . . . railroad . . . on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay (sec. 20(12) of the Interstate Commerce Act).

Surely it is obvious, however, that a railroad presented with a claim for freight loss or damage that occurred while the shipment was on another railroad's line, or that is attributable to another railroad's handling or mishandling of the shipment, must be reasonably prudent—nay, even cautious—in any settlement it makes, if it hopes to be made whole again by that other railroad. The right over (as the courts call it) is limited to such amount as the settling carrier is, in the statutory verbiage, "required to pay."

As a practical matter, this particular problem today presents no great difficulty. This is because the railroads, through the freight claim division of our association, have agreed to, and follow, a comprehensive set of rules for apportioning claim liability as among themselves. There is provision for arbitration to settle disputes arising between railroads under these rules. Regardless of this, it seems to me that it would be doubly unfair to impose a penalty for the failure of carriers to make payment of doubtful claims that are founded on the alleged misdeeds of other carriers to whom the paying carriers must look for reimbursement.

I used the word penalty. The penalty contemplated by these bills would be assessment of the claimant's attorney's fees against the defending carrier whenever the claimant's lawsuit on the doubtful claim prevailed or succeeded. It is no answer to say that under section 20(12) of the Interstate Commerce Act the attorney's fees so assessed would—on a balancing of the books, so to speak—ultimately be paid by the carrier responsible for the damage suffered by the skipper. It is still a penalty for not voluntarily making payment of a doubtful claim.

Now, despite all of the considerations I have mentioned, I recognize that the shippers—or at least some of the shippers—feel that it is they and not the carriers who are put upon in the matter of freight loss and damage claims. That is natural, I suppose. But entirely apart from the equities involved, let me tell you of some of the results we foresee if the law should be amended as here proposed.

We feel that enactment of these bills could not help but encourage and multiply the litigation of claims. In the first place, it would be certain to discourage and retard the voluntary settlement of freight loss and damage cases at the claims stage. There would be strong incentive for a claimant to reject an offer of negotiated compromise settlement and instead, if I may use the vernacular, "go for broke." His incentive? It would be that if he did prevail in court, he would not only be recompensated for whatever damages he might be found to have suffered, but would also be allowed an attorney's fee.[5]

Claimants for shippers would thus be tempted, in many instances, to forgo voluntary settlement procedures and resort, rather, to the courts. The claimant would run the risk of obtaining through litigation less than he might obtain in voluntary settlement, or even obtaining nothing at all, but the risk, in a very real sense, would be less than it is now, for if he did prevail, he would also recover an attorney's fee.[6]

Furthermore, Mr. Chairman, enactment of these bills would quite likely encourage litigation by spawning claims sharks—collection agencies, so to speak—who would find it profitable to solicit and accumulate large numbers of claims—largely, perhaps, of dubious merit—on which suit could be brought in the expectation that at least a certain proportion would be decided against the carriers, and that those so decided would carry with them allowances for attorneys' fees.

For these and similar reasons, then, the litigation of these claims would certainly grow by leaps and bounds, if this legislation were to be enacted. The added litigation would almost certainly involve, to a substantial extent, doubtful claims—claims of dubious merit. If that is so, you may well ask, how will the carriers be substantially hurt? How will this proposal unfairly harm them, since it provides for the recovery of attorneys' fees only in cases where the plaintiff is successful—only in cases, then, where the claim has been found to be meritorious?

The answer is to be found, of course, in the expense that would be incurred in defending against the floodtide of litigation these bills would likely unleash.

I should like to point out here that the proponents of a predecessor bill in the 90th Congress, and only some of them, at that, only with great reluctance gave half-hearted acquiescence to a suggested amendment that carriers successfully defending suits for freight loss and damage be permitted to recover their attorneys' fees from the unsuccessful plaintiffs. Even if the bill were to be amended so as to provide for the recovery of attorneys' fees by successful defendants, as well as by successful plaintiffs, there would still, in my judgment, be rank inequity directed against the carriers.

[5] Under S. 1653, allowance of an attorney's fee, would be discretionary with the court.
[6] Under S. 1653, allowance of an attorney's fee, would be discretionary with the court.

Assume, if you will, a situation in which a railroad is willing to pay $1,000 in settlement of a claim, but the claimant demands $1,500, and, not getting it, goes into court. If he were to get a judgment in any amount, even much less than the $1,000 offered him, he would be the prevailing party and would, under the House bills pending before you, be allowed an attorney's fee.[7]

Mr. KUYKENDALL. Did you get an opportunity to listen to the suggested amendment?

Mr. BREITHAUPT. I did.

Mr. KUYKENDALL. That would make it more palatable?

Mr. BREITHAUPT. Any safeguards included in the bill, if the bill is enacted, would, of course, help.

I prefer the one to which Mr. Webb referred, which is one that was approved by the Senate committee a couple of years ago.

I beg your pardon. I am thinking of something else.

Mr. KUYKENDALL. The one I suggested this morning, and Mr. Webb had it in his list, was the one which suggested that if the award was the same or less than what had been offered prior, there would be no award, period. In other words, there could be no claim for a lawyer.

The award by the court would have to be not the same, but actually higher, than the settlement offered before any award could possibly be made.

Mr. BREITHAUPT. That would certainly make the bill more equitable.

Mr. KUYKENDALL. Go ahead, sir.

Mr. BREITHAUPT. There are literally—and quite literally—millions of these freight loss and damage claims each year, in the case of the railroads alone. In 1969, the railroads that report to the Freight Claims Division of the Association of American Railroads received 2,472,740 such claims. That figure was not out of line with previous years. Indeed, it was low.

Here are the figures for the last 10 years, as reported to the AAR Freight Claims Division:

1960	2,872,860	1965	2,769,157
1961	2,842,197	1966	2,740,511
1962	2,764,759	1967	2,641,976
1963	2,760,632	1968	2,596,660
1964	2,811,205	1969	2,472,740

You will see that the figure for 1969 is indeed the lowest figure of tendered claims in the last 10 years.

Mr. KUYKENDALL. Sir, could you give us a chart, for which we could hold the record open, that would give us a comparative figure here, so that we could know really where we stand, and two other things: We would like to know the total amount of the going-in claim. We would like to know the number that you settled at all, and what percent of the claim was paid.

This is not the number of claims, sir, but how you handled these claims, is what the charge against you has been in the last 2 days.

Mr. BREITHAUPT. I could not give you the total amount of claims.

Mr. KUYKENDALL. How about the number that were settled during the year? For instance, the motor freight carriers have almost 100 percent settlement one way or other, with some sort of payment. You

[7] Under S. 1653, allowance of an attorney's fee would be discretionary with the court.

have been charged with having a very large number that you don't even settle at all.

In fairness to you and us, I think we need to know how many of the 2 million-some claims do you just never settle at all.

Mr. BREITHAUPT. I have a few figures, and then I would like to respond to your request.

(The following table was received for the record:)

SUMMARY OF CLAIMS RECEIVED AND CLAIMS PAID BY RAILROADS REPORTING TO FREIGHT CLAIM DIVISION OF ASSOCIATION OF AMERICAN RAILROADS

Year	New claims received	Claims reopened	30-day settlements	90-day settlements	Claims unsettled end of year	Ratio disposals to receipts
			Percent	Percent		Percent
1955	3,243,263	70,332	78.9	92.8	329,527	98.8
1956	3,423,823	73,161	76.3	91.1	326,856	100.1
1957	3,312,057	77,474	77.5	91.6	316,162	100.3
1958	3,051,187	71,618	77.3	91.7	292,252	100.8
1959	3,025,908	59,716	77.1	91.3	293,184	100.0
1960	2,872,860	57,679	75.6	90.8	300,660	100.3
1961	2,842,197	53,953	74.3	90.0	297,248	100.1
1962	2,764,759	51,114	76.4	93.0	302,964	99.8
1963	2,760,632	54,683	74.5	90.4	276,451	100.1
1964	2,811,205	62,985	73.6	89.4	298,228	99.4
1965	2,769,157	54,974	72.6	88.7	307,823	99.7
1966	2,740,511	59,882	71.2	87.6	319,521	99.6
1967	2,641,976	63,485	71.0	87.4	366,453	98.5
1968	2,596,660	69,095	70.1	87.3	463,659	96.1
1969	2,472,740	60,385	67.7	86.7	411,781	98.0

Mr. KUYKENDALL. Fine.

Go ahead.

Mr. BREITHAUPT. It is hardly my place here today to speak of overloaded court dockets, and the delay and congestion of cases in courts, but the purpose of citing the millions of claims that are tendered is to suggest the potential for litigation, and I ask you to reflect for just a moment on the potential of the figures I have just given you.

While on that subject, there is another matter that I would like to get into proper perspective. The proponents of this bill have on previous occasions left the impression that the small shipper, or at least the shipper with the small claim, is especially disadvantaged by the railroads' settlement practices and procedures. The facts just do not appear to bear this out.

In the same calendar year, 1969, for which I have obtained the figures, 2,280,163 freight loss and damage claims were paid by the railroads reporting to our freight claims division. The total amount paid out in these settlements was $210,100,163. Thus, the average claim settlement last year was less than $100.

You understand that some of the claims may have been from a prior year——

Mr. KUYKENDALL. This would be a continuing thing.

Mr. BREITHAUPT. First in, first out, so to speak.

Still, it is a good figure, I think.

Mr. KUYKENDALL. Your average over about 5 years here seems to be about 2.6 million. Right, about that?

Mr. BREITHAUPT. About, yes, sir.

Mr. KUYKENDALL. And you settled roughly 2.3 million?

Mr. BREITHAUPT. Yes, and the similar figure is available for all of those years.

Mr. KUYKENDALL. Those would be meaningful figures. One robin doesn't make a spring, here, but it seems that you are settling 2.3 million out of 2.6 million, that you settled for some amount.

Mr. BREITHAUPT. Yes, sir, and the total amount paid out in these 2.3 million was some $210 million. Thus, the average settlement was under $100.

I can't give you the total of claims submitted to the railroads, because, as the next witness can tell you, many claims don't carry any meaningful dollar values when submitted. They are submitted for $1 more or less, or $100 more or less, depending on later development of evidence to arrive at what is really in dispute.

In any event, as you know, and as has been pointed out, the Congress has in certain particular instances seen fit to provide what these bills would provide. The Congress, in a limited number of particular situations, has enacted statutes permitting successful plaintiffs to recover allowances for attorneys' fees, as is here proposed. In preparing for this hearing, and in comprehensively preparing for these hearings, I have undertaken to acquaint myself with those situations and to discover, if I could, the reasons for enactment of such statutes. I wanted to know just what the precedents are. I wanted to see if there is a pattern. I think I can fairly say that there is a discernible pattern, and that the reasons for the pattern are clear, and that they are understandable upon exposition.

I cannot be sure, and therefore am careful not to assert, that I have run to ground each of the instances in which the Congress has directed losing defendants to pay attorneys' fees to plaintiffs who prevail. On the basis of what I have found, however, and what I believe to be complete, I am convinced that the Congress would be plowing new ground—creating a unique and unwise exception to the general rule—if it wrote the provisions of any of these bills into statutory law.

Proponents of an identical bill in the 90th Congress, and again before the Senate committee with respect to S. 1653 in this Congress, and as recently as yesterday morning and again this morning, cited what they consider to be "precedents" for what they sought then, and are now seeking. Let us consider some of them.

One such "precedent" they cited was section 8 of the Interstate Commerce Act, in which it is provided that if a railroad violates any provision of that act applicable to it, it is liable to the persons injured thereby for the full amount of damages sustained in consequence of such violation "together with a reasonable counsel or attorney's fee in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

This provision is one of a number that the Congress has enacted to help insure compliance with its regulatory statutes. It is, for example, virtually identical with a provision of the Communications Act of 1934 to the effect that a communications common carrier violating any provision of that act is liable to the persons injured thereby for damages "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorneys' fees shall be taxed and collected as part of the cost in the case."

The philosophy of these two statutes, and others that are identical or similar, is that the public interest is served by encouraging private suits to enforce compliance with the Federal regulatory scheme. In other words, it is the purpose of the Congress in these statutes to encourage enforcement of the statute on the initiative of, and at the instance of, private parties.

As Judge Wyzanski, after alluding to the number of Federal statutes, all of which will be mentioned subsequently in this statement, put it in *Hutchison* v. *William C. Barry*, 50 Fed. Supp. 292, 298 (1943):

> The rationale in all the federal statutes is the same. The argument runs as follows. The government has set up a regulatory system for the benefit of persons in the plaintiff's class. To make the regulations effective private suits as well as public prosecutions are permitted. Suits by plaintiffs, if well founded, are in the public interest. Therefore, the cost of prosecuting successful suits should be borne not by those who were victims but by those who have violated the regulations and caused the damage.

The suit in which Judge Wyzanski was speaking happened to be a suit under the Fair Labor Standards Act, which makes an employer who violates certain provisions of that act, concerning the payment of minimum wages and overtime compensation, liable to affected employees in the amount of their unpaid minimum wages, or their unpaid overtime compensation, or both, and which provides further that in an action to recover such liability the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Similar provisions for the recovery of attorneys' fees in suits for damages based upon breaches of Federal statutory law are to be found in connection with violations of the Merchant Marine Act of 1936, the Securities Act of 1933, the Securities Exchange Act of 1934, the Servicemen's Readjustment Act, the Trust Indenture Act of 1939, the Civil Rights Act of 1964, a section of the United States Code (15 U.S.C. 72) making unlawful the importation or sale of imported articles at less than market value or wholesale price, and a statute enactment just this session having to do with misrepresentation in respect of the quality of articles containing gold or silver (Public Law 91–366). Another example is to be found, of course, in the case of suits brought under the antitrust laws by persons injured in their business or property by reason of anything forbidden in the antitrust laws. In antitrust suits, the successful plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

In each of the examples I have given so far, the situation has been one in which the Congress has by statute established standards of conduct or behavior that it believes to be in the public interest, and then, as a matter of public policy, has found it expedient to provide private persons injured by deviations from the prescribed standards of conduct and behavior with an additional incentive for bringing suits to redress the statutory wrongs committed. The assessment of attorneys' fees as part of the costs of litigation recoverable by successful plaintiffs is, of course, an incentive for instituting private litigation. It makes litigation more attractive—or, at least, less unattractive—to prospective plaintiffs. It may, indeed, be likened somewhat

to statutory provision for treble damages under the antitrust laws and to the exemplary and punitive damages that are sometimes assessed in other kinds of lawsuits.

A recent (1963) volume of the Lawyers' Edition, 2d Series, United States Supreme Court Reports, contains an annotation on "Prevailing party's right to recover counsel fees in Federal courts" (8 L. Ed. 2d 894). The authors of this annotation—and I shall refer again to it later—make the statement that statutes of the type I have so far mentioned: "suggest that in the classes of litigation to which they apply Congress seeks to encourage the bringing of suits or to discourage defenses against such actions." This expresses, in a nutshell, the point I have been laboring to make, and which Mr. Webb this morning made with much more facility than I have; to wit, that under the Interstate Commerce Act, for instance, those sections providing for the recovery of attorneys' fees are sections under which one has a choice as to whether or not he violates the law, and where Congress has said, "Don't violate it." That isn't true in the case of loss or damage occurring to a shipment in transit.

The claims being discussed in this hearing are not of such a character that the Congress should seek to encourage the bringing of suits on them. Such suits are not in the same category as suits for damages suffered by one who is harmed by reason of a carrier's failure to abide by the regulatory statute. Claims for freight loss or damage are not matters, in that sense, of public policy concern. Claims seeking redress for damage suffered because of breaches of regulatory statutes are matters of public policy concern.

A freight loss and damage claim involves merely a breach of the transportation contract between the shipper and the carrier. Violations of the regulatory statutes, on the other hand, go beyond matters of the national interest, and these do not.

The proponents of the pending bills have referred to the provisions of section 15(9) of the Interstate Commerce Act. It is there provided that:

> Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading * * * such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property * * * [and] in any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.

Here again, obviously, the right of a successful plaintiff to recover an attorney's fee from a losing defendant is predicated upon that defendant's violation of an express regulatory command. There is no such predicate in the case of freight loss and damage. There is no regulatory command involved.

If claims for freight loss and damage did represent violations of the regulatory statute, and thus were the kind of claims heretofore recognized by the Congress as being of a nature that should, as a matter of public policy, be pursued through private litigation as a means of enforcing the regulatory scheme, the proponents would not be here today seeking additional statutory enactment. They would already—as they are not—be entitled to recover allowances for attorney's fees under the general provisions of the Interstate Commerce Act. Section 8

of the act, as I cited earlier, and as other witnesses have cited, already contains this extraordinary remedy of added redress for those injured whenever a railroad "shall do, cause to be done, or permit to be done any act, matter, or thing in this [act] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this [act] required to be done." There this extraordinary remedy already prevails.

What I am trying to say is that the Congress has thus already enacted public policy legislation allowing attorneys' fees in suits successfully brought for damages suffered in consequence of carriers' violations of the express commands of the Interstate Commerce Act, thus promoting enforcement of that act, and the suits that are the subject of consideration here today are not included. Nor should they be. They are not, I emphasize again, of the public policy category.

The proponents of this legislation have also cited provisions found in section 16 of the Interstate Commerce Act under which the Interstate Commerce Commission is, in certain circumstances involving violation of the act—such, for example, as the charging of excessive freight rates or discrimination in car distribution—directed to ascertain the amount of damages due to a complainant because of a carrier's violation of the act, and make an order directing the carrier to pay that sum to the complainant, and providing further that if the carrier does not comply with the order for payment of the sum, the complainant may bring suit, and "if the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

This statute is typical of a number of others. If the Secretary of Agriculture, acting under the Packers and Stockyards Act, makes an order for the payment of money, and the defendant does not comply, suit may be brought, and, "if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

There is an identical provision of law in the case of suits brought against commission merchants, dealers, or brokers, for nonpayment of reparation awards made against them by the Secretary of Agriculture under the Perishable Agricultural Commodities Act. Similarly, if a carrier does not comply with an order of the National Railroad Adjustment Board, the petitioner may file a petition in Federal court, and "if the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

The distinguishing characteristic of all of these latter statutes is that, in each case, there has been an administrative determination or adjudication on the merits, and an order to pay a certain sum or otherwise comply, before the litigation stage is reached. A governmental agency—whether it be the ICC, or the NRAB, or the Secretary of Agriculture—has already heard the parties and rendered a decision. There is always the possibility that a different result may obtain on judicial review, but the defendant, so to speak, has "had his day in court," albeit at the commission, or board, or departmental level, and there is at the very least a prima facie liability or obligation on his part.

Not so in the case of freight loss and damage claims. The two situations are not analogous.

Then, passing reference has been made by the proponents of the legislation to section 222(b) of the Interstate Commerce Act, enacted just 5 years ago (section 4 of Public Law 89-170, approved September 6, 1965). Under that section:

> If any person operates in clear and patent violation of any provisions of * * * [certain sections of the act], any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section * * *. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section * * * and enjoining upon it or them obedience thereto * * *. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court * * *.

Here again, the provision for award of an attorney's fee to a prevailing plaintiff has been made in lawsuits based upon violation—indeed, in this case "clear and patent violation"—of the regulatory statute itself. Public policy calls for the encouragement of private litigation as a means of halting unlawful "gray area" transport operations. Suits on claims for freight loss and damage, representing merely a breach of the transportation contract, are not in that category.

I said that I would come back to the annotation on "Prevailing party's rights to recover counsel fees in Federal courts" found in the United States Supreme Court Reports, Lawyers' Edition, 2d Series (8 L. Ed. 2d 894). Let me now do so.

A major part of that annotation has to do with what is under consideration in this hearing; i.e., "Recovery of counsel fees pursuant to statute." I assume the annotation, professionally compiled for 1963 publication, to be reasonably complete.

I want to say to you that I have, in the course of this statement, referred to every single statute on this subject discovered and mentioned by the annotators (and several others besides) except the Federal statute relating to "docket fees" (which clearly is not germane here), the matter of attorney's fees in "diversity cases" (application of State laws), copyright and patent cases (clearly a special area), and Bankruptcy Act matters (also clearly a special case).

One of the witnesses who appeared before the Senate Surface Transportation Subcommittee on July 18, 1967, in support of S. 858, a predecessor bill considered in the 90th Congress, Mr. H. Haskell Lurie (attorney at law, Chicago, Ill.), submitted for the record a "Memorandum, Brief and Argument" in which he listed (at p. 14) the "Torts Claims Act, 28 U.S.C. 2678 (1964)" as an instance in which "Congress has selectively provided a similar remedy" for the recovery of attorneys' fees. The witness was in error.

The reference is to a provision of the Federal Tort Claims Act, codified at 28 U.S.C. 2678, which (as amended by Public Law 89–506, approved July 18, 1966) provides that:

> No attorney shall charge, demand, receive or collect for services rendered, fees in excess of 25 per centum of any judgment rendered * * * or in excess of 20 per centum of any award, compromise, or settlement made * * *.

This is merely a limitation upon what the plaintiff's attorney may charge his client. It does not provide for the recovery of attorneys' fees from the defendant (United States).

Even before its amendment, 28 U.S.C. 2678 included no provision for taxing attorneys' fees against the defendant. It merely fixed maximum percentages that might, in the discretion of the court or agency, be determined and allowed as "reasonable attorney fees * * * to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant." Hence, the Federal Tort Claims Act is not, nor was it prior to the 1966 amendment, a precedent for the bills now under consideration.

On this basis, Mr. Chairman, I submit that there is no real congressional precedent for the bills now being considered. Suits based upon claims for freight loss and damage are not of such a nature as to fall within any of the categories as to which the Congress has on other occasions provided by law for the recovery of attorneys' fees. Nor is there anything so special about either the circumstances of this litigation or the nature of the legal rights and duties involved in this litigation as to warrant special treatment of the plaintiffs in freight loss and damage suits.

One further point, if I may:

The proponents of this legislation have made much of a provision contained in section 20(12) of the Interstate Commerce Act, where it is provided that when either the originating carrier or the delivering carrier is required to make payment of a claim for loss or damage to freight—that loss or damage having been sustained on the line of a railroad other than the one paying the claim—the one paying the claim may recover from the railroad on whose line the loss or damage did occur such amount as it shall have so paid together with "the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property."

This is a different situation altogether, of course, from that presented in loss and damage claim controversies between shippers and carriers. By no stretch of the imagination does it, when you understand it, constitute an analogy for what is now proposed.

As I explained earlier, and as other witnesses have explained earlier, section 20(11) of the Interstate Commerce Act makes it the unusual legal obligation of originating carriers and delivering carriers to pay shippers' claims for freight loss or damage even though such loss or damage was sustained on the line of some other railroad. It is only fair and simple equity, in these circumstances of vicarious liability, to allow the carrier defending in court against a claim to obtain from the other railroad, in whose behalf the claim was defended, reimbursement of the expenses of that defense, including whatever counsel fees the defending carrier incurs. This is not the award of an attorney's fee to the victorious party in an adversary contest between two disputants. It is merely the recoupment of moneys expended in another's behalf, and is an essential incident of the proxy liability, if I may call it that, imposed by the statute.

(Appendix A to Mr. Breithaupt's statement follows:)

APPENDIX A

The reference work *American Jurisprudence* puts it this way—

"The right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. Such an item of expense is not allowable in the absence of a statute or rule of court or in the absence of some agreement expressly authorizing the taxing of attorneys' fees in

addition to the ordinary statutory costs. This rule is not changed by the fact that fraudulent or malicious acts are disclosed, although in certain circumstances fraud or malice may furnish a basis for the recovery of the expenses of litigation, including counsel fees, as an element of damages." (20 Am. Jur. 2d Costs § 72)

And—

"As a general rule, and in the absence of any contractual or statutory liability therefor, attorneys' fees and expenses of litigation incurred by the plaintiff or which the plaintiff is obligated to pay, in the litigation of his claim against the defendant, are not recoverable as an item of damages, either in a contract or a tort action. (22 Am. Jur. 2d Damages § 165)

* * * * * * *

"There is a difference of opinion upon the question whether counsel fees and other expenses of litigation may be included in estimating the damages in cases where exemplary or punitive damages may be given. According to the rule in a number of jurisdictions, in tort actions founded upon a wrong which involves elements of fraud, malice, or wantonness such as authorize an award of punitive or exemplary damages the plaintiff's probable counsel fees and expenses of litigation may be taken into consideration in assessing the damages. * * * In some jurisdictions an allowance of counsel fees and other expenses of litigation beyond taxable costs as an element of damages is not permissible even in cases where exemplary damages are proper." (Id., § 167.)

In *Corpus Juris Secundum*, it is summarized thus—

". . . as a general rule, in the absence of statutory or contractual authorization, there can be no recovery as damages of the costs and expenses of litigation, or expenditures for counsel fees, regardless of whether the successful litigant is plaintiff or defendant, even though the necessity of engaging in the litigation was caused by the wrongful act of the opposing party. Such expenses or expenditures are not recoverable as general or special damages, either in the action in which they were incurred or in a subsequent action between the parties.

"In cases of civil injury or breach of contract, in which there is no fraud, willful negligence, or malice, the courts have considered that an award of the costs in the action is sufficient to cover the expenses of litigation and make no allowance for time, indirect loss, and annoyance. Accordingly, litigation expenses and attorney fees are not ordinarily recoverable as damages either in tort actions or in actions for breach of contract, and they have been held to be precluded as damages in actions for accounting, actions to recover real or personal property, actions for conversion, mandamus or injunction proceedings, and in other actions or proceedings.

"There are, however, various exceptions to, or modifications of, the general rule, and under some circumstances where the wrong is of such character that the proper protection of his rights requires plaintiff to employ counsel to gain redress, it has been held that plaintiff may recover reasonable counsel fees as an element of damage." (25 C.J.S. Damages § 50)

Mr. BREITHAUPT. One final word, Mr. Chairman and Mr. Kuykendall. I would like to express also the view that was made known to the subcommittee this morning by Messrs. Webb and Beardsley. That is, to suggest to you that in light of the comprehensive, and what one has every reason to believe will be thorough, investigation in an ex parte proceeding now being conducted by the Interstate Commerce Commission on much the same subject matter that is at issue here, and is the subject of shippers' complaints here, that the record is likely to be much more complete upon the conclusion of the Commission's investigation than it is today. I concur in the suggestion made by the two carrier witnesses this morning that you might consider awaiting the outcome of that proceeding.

I am to be followed, Mr. Chairman, with your permission, by two gentlemen here at my request, and with your permission, who are practical claims men from two representative railroads, and who are engaged every day of their working lives in the settlement of claims and in the handling and processing of claims such as those that are here the subject of controversy.

Before they come forward, I am, of course, available for questioning.

Mr. ADAMS. Mr. Breithaupt, do you want them to come up and make statements with you, so that we have the three of you available? How would you like to handle that?

Mr. BREITHAUPT. If that is the Chair's wish.

Mr. KUYKENDALL. Mr. Adams, it seems to me that with the line of questioning we are going to have, that they should be here probably to answer questions.

Mr. ADAMS. Why don't we have the two gentlemen come up and make whatever statements they wish?

Mr. KUYKENDALL. I am not going to be able to stay but another few minutes. I think you would like to have them with you on some questions.

Mr. ADAMS. Gentlemen, why not come forward, and if you have statements to issue, or wish to make some statements, why don't you summarize your statements, and file them, and then Mr. Kuykendall may start to question, and I will go over these and ask you some additional things, too.

Mr. BREITHAUPT. Mr. Chairman, I hate to see these men, who have come from distant parts of the country, deprived of the opportunity to make their statements.

Mr. KUYKENDALL. I am only saying that I must leave. We have come back here this afternoon because of these gentlemen, Mr. Breithaupt, and if you had been willing to paraphrase a great deal of your statement, they could have come through with theirs more easily. You did have about 50 minutes.

We have made an exception in coming back here because of these gentlemen, and I do have to leave and catch a plane. I am very sorry about that.

Go ahead, Mr. Chairman.

Mr. ADAMS. Gentlemen, why don't we do this: I will stay as we are going through the statements here, but if Mr. Kuykendall has some particular questions as they go along, I would suggest that you might make particular points that you wish to make, so that he could then question you. Then if you want to go through your statements, I will certainly stay and receive those from you.

Let's start with Mr. Wiley.

Which one is Mr. Wiley?

Mr. Wiley, why don't you do that, rather than reading, so that you can take advantage of Mr. Kuykendall's time here, and Mr. Hennessey, also.

STATEMENT OF W. B. WILEY, GENERAL FREIGHT CLAIM AGENT, SOUTHERN PACIFIC TRANSPORTATION CO.

Mr. WILEY. All right, sir.

(Mr. Wiley's prepared statement follows:)

STATEMENT OF W. B. WILEY, GENERAL FREIGHT CLAIM AGENT, SOUTHERN PACIFIC TRANSPORTATION CO.

My name is W. B. Wiley. I am employed as General Freight Claim Agent, Southern Pacific Transportation Company, with office at One Market Street, San Francisco, California 94105. The lines of Southern Pacific extend from San Francisco north to Portland, Oregon; east to Ogden, Utah; south to Los

Angeles, California, and thence to New Orleans, Louisiana via Phoenix, Arizona, El Paso and Houston, Texas. My duties include general supervision over all claims filed against Southern Pacific for loss or damage to shipments of freight.

During the year 1969, 287,754 claims were filed against Southern Pacific for a total amount of $45,775,566.36. Seventy-seven per cent of these claims were settled within 30 days, 14 per cent were disposed of between 31 and 90 days, and 9 per cent after 90 days. It is thus apparent that the great majority of claims filed against Southern Pacific were paid or otherwise disposed of within 90 days.

Previous witnesses have testified before this Committee as to the problem facing the nation's railroads in connection with the handling and processing of claims for loss or damage to shipments of freight. Millions of such claims are filed annually by shippers, and millions of dollars are paid each year by railroads in satisfaction of their liability as common carriers. The nation's railroads have long realized the gravity and the magnitude of the problems which unquestionably affect the shipping public and carriers alike.

The railroads have waged a constant and continuing battle to reduce loss and damage to freight shipments through handling with their employes to eliminate rough handling in switching the movement of trains and through cooperative efforts with the shipping public to find new and improved ways of packaging shipments intended for freight transportation. Improved shock absorbing freight cars and interior equipment have been placed in service to accommodate shippers for which the carriers have expended large sums of money. Notwithstanding these efforts, the claim bill continues to mount.

Although railroads, as common carriers, are subject to a strict rule of liability, it is not an absolute liability. At common law and under statutory provisions as set forth in the bill of lading contract, terms and conditions, various defenses are available to a carrier in connection with claims for damage to shipments of freight. For example, a common carrier is not liable for damage caused by an act or default on the part of a shipper. Therefore, when investigation discloses that damage has resulted from a failure on the part of a shipper to properly load and brace a shipment or to properly package it, a carrier has the right—in fact—the duty to assert this defense in the settlement of a claim. Similarly, if a carrier has reason to believe that damage resulted from physical handling of a shipment by a shipper at point of origin or handling by a consignee at destination, it has a right to assert such defense in settlement of a damage claim. Where it is apparent or there is reason to believe that damage was caused by an inherent vice in a commodity, such defense must also be asserted by the carrier.

In most instances of transportation, the product is offered for movement completely encased in a package, carton, or container of some kind; and for the most part the contents are not visible for inspection. More often than not the product has been handled by materials-handling equipment, such as a fork lift or clamp truck, etc., and has had some form of prior transportation in the shipper's own trucks or conveyors. The same is true at destination.

The products generally are both loaded and unloaded by other than rail carrier's personnel—in other words, these movements constitute a shipper's load and a consignee's unload. The opportunity for damage to occur in manufacture, containerization, loading, warehousing, unloading, decontainerization, weighing, improper shipping instructions, or transportaton are all possible. Most of the handlings, or opportunities for damage, are not a rail carrier's function or responsibility. However, the carriers are, in ever increasing numbers, being asked to assume the entire loss regardless of where the damage may have occurred or how many times the lading may have been handled by others.

It is equally important to establish the correct value of any loss or damage. The law provides that a carrier responsible for the loss shall pay the full actual loss. The wide range of items transported obviously leads to many difficulties in determining their value. In this category are livestock, baggage, household items, used machinery, airplane wings, shipments described on the bills of lading as "merchandise" or "electronic equipment", perishable commodities, etc. Claims often include repair bills, use of heavy hauling equipment, cooperage, transportation of substitute parts and labor costs. Many of these charges are proper, but others are unwarranted or unsupported.

In the case of fresh produce, field or growing conditions are often so varied as to make it impossible to know the true shipping quality; occasionally the protective instructions from the shipper to the carrier are improper. Often a circuitous routing, deliberately delaying the shipment, will be ordered by the shipper, or

a consignment is ordered by the shipper to be held at a diversion point awaiting a sale or a stronger market. These factors, when present, often result in a reduced sale; but are not a carrier's responsibility.

It should be noted that perishable shippers and receivers themselves restrict the ability of the rail carriers to properly handle their claims because of their practice of filing nonsupported protest claims. As an example: in two of the major U.S. markets (New York and Boston), it is the practice of these receivers or their agents to file a protest and notice of claim on nearly 100 per cent of the shipments delivered.

This practice has the effect of requiring carriers to perpetuate their records forever or, as an alternative, to decline a claim that has not yet been filed.

It is significant, I believe, to note that loss and damage claims are ultimately filed on only approximately 30 per cent of the shipments, many of which are filed as late as four years after delivery, thus making it extremely difficult for carriers to investigate a claim and nearly impossible for them to properly defend a lawsuit because lapse of time has resulted in loss or destruction of necessary records. Many of these claims are later voluntarily withdrawn.

These claims are filed by independent claim agencies (commonly referred to as "claim sharks") who handle them on a contingency basis. They have a personal interest in fomenting claim controversies, and hope to capitalize on some minor defect which may develop in carriers' handling record of a particular shipment even though there are other circumstances showing that damage was not caused by the carriers.

In addition to physical damage losses, such as damage by the act or default of the shipper, losses often occur because of poor sales technique or include claimed items of special damage—standby time, loss of use, loss of sale, unusually high overhead charges added to repair costs. In some cases, claim values are based on a single unit retail price rather than on destination carload wholesale value—in some cases, profits are added where they have not been earned. In addition, there exists a wide variety of other costs or charges, all of which generally have been held not properly to be considered as transportation loss; but some claimants are including them in claims or suits filed with the transportation companies.

The mere fact that damage is found at destination does not prove that the shipment was received by the carrier in good transportable condition nor establish liability of a carrier for payment of a claim for such damage. It is incumbent upon carriers, in their own interest, and to meet their legal obligations, to determine the facts and circumstances surrounding the movement of claim shipments. Such investigation is made obviously to protect the revenues of a carrier, but more importantly it is done to avoid the possibility of making an unlawful rebate to a shipper. The payment of a claim where liability had not been established would subject a carrier to possible prosecution under the Elkins Act. If successful, such prosecution could result in imposition of a minimum fine of $1,000 and a maximum fine of $20,000 on each count. The nation's railroads, therefore, have freight claim departments staffed by investigators and adjusters for the handling and processing of freight claims. Extensive investigation may be necessary depending upon the type of claim and the nature of the damage for which recovery is sought. It is not unusual for a carrier to engage in correspondence with numerous carriers who may have participated in the transportation of a shipment in order to develop all pertinent and necessary facts.

After investigation has been completed, an adjuster will endeavor to arrange an equitable and reasonable disposition of the claim based upon the facts developed by the investigation. This will be done either through correspondence or through personal discussion with a claimant.

Where investigation discloses carrier liability under established principles of common carrier law, the claim is paid in full at once. This is the normal practice. In many cases, it is doubtful that the damage resulted from carrier mishandling or from some cause for which a carrier is not liable. In such circumstances, a carrier could disallow the claim in its entirety and force the matter into litigation so that any factual dispute could be resolved by a court or jury. This is not the practice followed by carriers, however, as in such circumstances an effort is made to compromise a claim on a reasonable and equitable basis consistent with the facts developed by investigation.

The great majority of all claims filed against the nation's railroads are disposed of in the manner indicated above, i.e., either by payment in full or on a compromise basis. Of course, where the carrier is convinced that no liabilit

whatsoever exists, a claim is disallowed—in a great many cases, claims are voluntarily withdrawn by a claimant; but the investigating cost to the carriers remains.

In addition, numerous small claims are paid by carriers forthwith upon receipt. Such claims in amount $50 or less are investigated only for the purpose of establishing that damage occurred and that a loss was suffered. Such limited investigation is prompted by economic necessity. Obviously, extended investigation and its attendant expense is not justified in the handling and processing of claims for a small amount.

As I have stated, the great majority of claims are thus handled reasonably, expeditiously, and to the satisfaction of the shipping public generally. This is evidenced by statistics which I will here repeat. During the year 1969, 2,472,740 claims were filed against all carriers. Claim payments amounted to $210,100,163 representing 67.7 per cent settled within 30 days, 19 per cent disposed of between 31 and 90 days, and 13.3 per cent after 90 days.

Of course, there are exceptions to the general handling of claims which I have outlined. It is human to err and situations have arisen in the past and undoubtedly will arise in the future when the disposition of a claim has been unduly delayed. Errors in the handling of particular claims do not justify the conclusion that carriers have been arbitrary in the handling and disposition of claims generally and that they should therefore be saddled with the unjustified and extraordinary penalty of having to pay attorney's fees when a shipper feels he has no alternative but to file suit to recover his claim. I should like to emphasize that no evidence has been presented to this Committee to justify imposition of this extraordinary penalty.

It should take no stretch of the imagination to conclude that passage of the bill would deprive carriers of the opportunity to adjust and compromise a claim on the basis of the facts developed by the investigation particularly where it cannot be determined that damage resulted from carrier handling or by an act or default on the part of a shipper, or some other cause for which the carrier is not liable under established legal principles. It is my considered opinion that a claimant would not listen, much less pay attention, to argument or contention of a carrier's adjuster that the damage resulted or could have resulted from one of the excepted causes, such as act of default of a shipper, for which the carrier is not liable. If a shipper knows that the carrier must pay his attorney's fee, I believe it is reasonable to assume that he will have every incentive to take his chances in court in the expectation and hope that the factual dispute will be resolved against the carrier.

The foregoing conclusion is supported by a review of applicable law which is already heavily weighted in favor of a shipper plaintiff. A prima facie case of liability is made by a plaintiff in a suit against a carrier for damage to a shipment moving in interstate commerce by showing that the shipment was in good order and condition at point of origin and in a damaged condition at destination. This proof is relatively easily made, and thereafter the carrier has the burden of affirmatively establishing its contention that the damage resulted from one of the excepted causes set forth in the bill of lading. In addition, the carrier must affirmatively establish that all carriers participating in a movement performed the transportation service without mishandling. Transportation by rail from coast to coast generally involves several railroads. Development of such proof is time consuming and extremely expensive.

In the circumstances which I have outlined, I am confident that no carrier would attempt to defend such litigation. Threatened with the filing of a suit a carrier would have no alternative but to pay all claims for the full amount demanded by a claimant. The past practice of reasonable aid equitable handling and adjustment of claims would be terminated.

As I have indicated, the great majority of claims are paid within 90 days; and over all I am convinced that carrier handling of claims has been fair and reasonable, bearing in mind the extensive investigation which is often required to insure that payment is made only of claims for proven and established carrier liability. I would specifically comment that the small shipper who may file a claim for a relatively small amount is fully protected under present practices and applicable law. As I have stated, claims for small amount of approximately $50 are paid almost immediately after limited investigation without question. Other claimants on claims up to approximately $200 can obtain recourse in the event of denial of a claim by filing suit in local Small Claims Courts where lawyers may not normally appear. If a shipper obtains recovery here, he is also generally entitled to payment of court costs.

The only result of enactment of this bill would be (1) more litigation or (2) payment in full of claims filed against a carrier even though there were reasonable grounds to believe that such payment is not justified by the facts of record.

Mr. WILEY. Attempting to summarize some of the thoughts that I have in my statement, sir, I note the proponents of the bills here have indicated that the small claimants are being harassed, or that the small claimants are having their claims arbitrarily handled, and I wish to state that on our railroad, and on the railroads that I have handled claims with, this is just not so.

In the processing of small claims in our company, and we receive over 285,000 claims from claimants each year, we have what we call a slaughter desk for claims from $50 to $100. All claims received go across this slaughter desk, and all we do in these instances is to verify that the damage actually occurred in transit. We review the inspection report and verify the value, and conclude the claim.

Mr. KUYKENDALL. What percent of the total claims are settled? This is a question I asked earlier of Mr. Breithaupt. What percent of the total?

Mr. WILEY. Of the total claims received?

Mr. KUYKENDALL. What percent are settled, for any amount?

Mr .WILEY. In the year 1969, we received 285,703 claims.

Mr. KUYKENDALL. That is about typical of your previous years?

Mr. WILEY. Yes, sir.

Mr. KUYKENDALL. So I understand that you don't receive and settle all the same ones in the same year.

Mr. WILEY. That is right.

Mr. KUYKENDALL. You have the average of about 3 or 4 years, and it is about 285,000?

Mr. WILEY. Yes; and increasing. We received 285,000, and we settled, paid in the year 1969, 261,174 of those claims.

Mr. KUYKENDALL. Do you know whether or not that is about an average figure?

Mr. WILEY. Yes, sir.

Mr. KUYKENDALL. Go ahead, sir.

Mr. WILEY. The processing of small claims presents no difficulty for us whatsoever. We don't have the time nor can we spend the money to write and correspond and debate with claimants on small claimed amounts.

Incidentally, in all the areas that I serve, the claimant has the opportunity to go to a small claims court, where in our area no attorney is allowed, and the claimant can get all his service by mail.

The claimant goes into the small claims court, and again no attorney appears. Carriers cannot use an attorney in opposition. It is actually an equity court, I believe they call it.

Mr. KUYKENDALL. What was the average size claim? Mr. Breithaupt gave me an average of roughly $100. You gave me 261,000 settled. What is the total amount of dollars?

Mr. WILEY. I don't have that.

Mr. KUYKENDALL. Do you think it is roughly like the national average as Mr. Breithaupt gave it?

Mr. WILEY. We paid something over $20 million chargeable to our line.

Mr. KUYKENDALL. So that gets to $80, roughly.

Mr. WILEY. Yes, sir. It is something less on an average.

Mr. KUYKENDALL. Both of you come up with figures, so that all I have on my pad is a little simple arithmetic, and we have the basis for all this case.

At $50 a claim, you didn't settle maybe 150,000 worth of them, no settlement at all, at just $50 a lick. That is a number that you didn't do anything at all with. That is $1,150,000 worth, and in the national figure you gave, that came to $15 million, this difference between the average settlement of any figure at all, not talking about the amounts you deducted for the claims of the ones that you did settle.

This is just the ones you didn't settle at all, didn't do anything at all with. At $50 apiece, that would be $15 million annually, or, in your case, $1,150,000.

Mr. WILEY. I don't follow you.

Mr. KUYKENDALL. Look here. The scrap metal people come here. If you pick up 50 tons of scrap metal, and deliver 49 tons, how can you not settle a claim?

Mr. WILEY. We settle them.

Mr. KUYKENDALL. You just told me that there are 23,000 claims you didn't settle at all.

Mr. WILEY. Sir, we are a very large perishable-carrying carrier, and a substantial number of the perishable claims are filed with our company, and about 50 percent of the perishable claims filed are handled by claim collection agencies right today. Some of the large ones, file claims on each and every car that is shipped, for amounts of $1 more or less, $100 more or less, or for some indefinite amount. They are fishing for a possible carrier defect.

Mr. KUYKENDALL. I understand.

Mr. WILEY. These claims that we have deducted from those that were not paid include a large percentage of those claims.

After we have developed a record, at a considerable expense, and a considerable time, and a considerable interference with the processing of good, sound claims, the claims are immediately withdrawn by these claim collection agencies.

Mr. KUYKENDALL. Now, on perishables, this is easy to understand; meats and anything.

Mr. WILEY. Yes, sir.

Mr. KUYKENDALL. But the most puzzling testimony we have had in this entire series is from the scrap-metal people. Are you not responsible in the case of scrap metal, of all things, to deliver what you pick up?

Mr. WILEY. Absolutely.

Mr. KUYKENDALL. How can there be a nonsettlement of a scrap-metal claim?

Mr. WILEY. I don't know, sir.

Mr. KUYKENDALL. You have been charged directly in the record with nonsettlement at all of a great many scrap-metal claims.

Mr. WILEY. It is something I am not familiar with, Mr. Kuykendall.

Mr. KUYKENDALL. I wish you would examine the record on that.

Mr. WILEY. I heard the man's testimony.

Mr. KUYKENDALL. This is puzzling to us. The perishable thing gets so clouded that nobody can understand it, but what happened in 1966 to your practices? How did they change?

Mr. WILEY. Not at all.

He said Eastern carriers, I think, sir.

Mr. KUYKENDALL. Are you familiar with the testimony I am talking about?

Mr. WILEY. Yes; I think so.

Mr. ADAMS. While Mr. Kuykendall is looking for that, and if you would hold your thought, Mr. Hennessey, do you have something you would like to contribute to this conversation?

I am not going to try to cut you off. As I say, if you want to complete your statements later, I would be very pleased to wait and hear them.

Mr. KUYKENDALL. Here is the testimony that I am concerned about, Mr. Chairman:

Mr. FRAZIER. Mr. Kuykendall, I would like to say something. Your idea and the way we used to handle claims are very, very close. In days before 1966, let's take a terminal elevator operation that unloaded perhaps 100 cars a day. Following the procedures that were outlined, the shipping weights and the receiving weights were put together, a large stack of 15 or 30 days of terminal operations were put together. The claim agent from the railroad came in and sat down, and went over the individual claims.

Mr. KUYKENDALL. The stack of them?

Mr. FRAZIER. Yes. He went over some of them quickly with a representative of the company.

Mr. KUYKENDALL. How quick did that happen, once a month, or twice a month?

Mr. FRAZIER. About once a month.

Mr. KUYKENDALL. That was pretty good service.

Mr. FRAZIER. Yes; and we were happy with it. Within 2 or 3 hours the claim agent would throw out certain claims, saying: "That fellow has a history that is not good and we won't pay you anything," and he would have a stack here of $15 claims, and they wouldn't be bothered with that.

On the other claims, you came to a settlement, and it took an hour or two. That was always under the idea of giving the railroad the one-eighth of 1-percent tolerance.

This was a very equitable manner, and in almost no case did any claim ever go to court.

Then back in April of 1966 when the arbitrary claim settlement basis was put in, whereby the railroads——

Mr. KUYKENDALL. What do you think motivated this, their financial contribution?

Mr. FRAZIER. I think the railroads looked at—I am an outsider, and I have no inside information—I think they looked at the costs of their claims staffs and their costs of claims and figured they could run these things through on a computer on a 50, 75, or 100 percent no-payment basis and save $10 million a year, and they put it in.

Mr. BREITHAUPT. You said scrap metal first, did you not, sir?

Mr. KUYKENDALL. You all have been accused of having changed the practice. This was grain here, and it is scrap metal in other cases. There were several people who testified, each saying there was an abrupt change in practice.

Mr. BREITHAUPT. There is a big difference in the handling of scrap metal and grain, Mr. Kuykendall; for example the manner in which the shipment is weighed at origin and destination, and there is a long story on grain that is not applicable in the case of scrap metal.

Mr. KUYKENDALL. Maybe we ought to make it applicable. We can pass anything we want here, sir. Why should you be allowed to lose more than one-eighth of 1 percent of a load of grain?

Mr. BREITHAUPT. Who is to say that we lost it?

Mr. KUYKENDALL. If you didn't deliver it, you lost it.

Mr. BREITHAUPT. Who weighed the shipment, Mr. Kuykendall?

Mr. KUYKENDALL. Did you accept the weight?

Mr. BREITHAUPT. We accepted the transportation as a practical matter. Maybe it was weighed by the shipper.

Mr. KUYKENDALL. You mean you take somebody else's word for the weight of the item that you carry on your railroad?

Mr. BREITHAUPT. Frequently.

Mr. KUYKENDALL. You shouldn't.

Mr. BREITHAUPT. We have to, in grain. Grain has a hard enough time moving, as it is.

STATEMENT OF THOMAS W. HENNESSEY, FREIGHT CLAIM AGENT, LOUISVILLE & NASHVILLE RAILROAD CO.

Mr. HENNESSEY. May I interrupt?

Mr. ADAMS. Just one moment, Mr. Hennessey.

Without objection, your prepared statement will be made a part of the record, at this point.

(Mr. Hennessey's prepared statement follows:)

STATEMENT OF THOMAS W. HENNESSEY, FREIGHT CLAIM AGENT, LOUISVILLE & NASHVILLE RAILROAD CO.

My name is Thomas W. Hennessey. I am Freight Claim Agent of the Louisville and Nashville Railroad Company, in charge of its Freight Claim Department, with headquarters at Louisville, Kentucky. During my career in the Freight Claim Department I was a Freight Damage Inspector for 10 years. Thereafter, I held the position of Traveling Claims Adjuster for 7 years. In that capacity I was responsible for the investigation and settlement of complicated or other claims requiring personal contact with the claimant. Finally, in 1964 I was promoted to the position of Freight Claim Agent.

The Louisville and Nashville Railroad Company serves 13 states and operates generally from Chicago and Cincinnati on the north to New Orleans and Atlanta on the south and from St. Louis and Memphis on the west to points in southwestern Virginia on the east. It serves such major intermediate cities as Louisville, Evansville, Nashville, Chattanooga, Birmingham, Montgomery and Mobile.

L&N presently employs 63 individuals in addition to me to work in the investigation and settlement of freight claims and in the operation of a central salvage facility. In addition to those employees on the headquarters staff in Louisville, there are 4 field investigators located at Terre Haute, Indiana, Louisville, Kentucky, Nashville, Tennessee, and Mobile, Alabama. Furthermore, 2 individuals are employed at the central salvage facility at Nashville.

My appearance here today is on behalf of the Louisville and Nashville Railroad Company and is for the purpose of expressing my views about S. 1653 and H.R. 9681, the bills introduced with respect to recovery of attorneys' fees in those cases of successful maintenance of actions for recovery of damages sustained in the transportation of property.

As Freight Claim Agent of the L&N I have been able, during the last 6 years, to observe the handling of freight claims and litigation involving loss of or damage to shipments in transit. During 1969, a representative year, L&N received 42,915 claims direct from claimants, representing a total demand of $8,192,807. In addition, it received 82,607 claims, for a total of $2,827,672, from other carriers, representing the demand from connecting carriers for the payment by L&N of its portion of claims paid by those carriers direct to claimants and distributed among the participating carriers in accordance with the Freight Claim Rules of the Association of American Railroads. In other words, L&N received during 1969, 125,522 claims, representing a total demand of $11,020,479. Of these total claims, 3,258 were declined. Approximately 25% of these were later settled on a compromise basis with the claimant. In addition, 214 claims were withdrawn by the claimant as being totally without merit. 39,703 claims were paid or settled directly with the claimants, and an additional 82,607 claims were settled with connecting carriers. Therefore, during 1969 the Freight Claim Division of the

L&N paid 122,310 claims, for a total of $8,755,086. A copy of a table showing claims for the years 1969 and 1968 is filed with this Statement and made a part hereof as Exhibit A.

Of the 42,915 claims received directly from claimants, 72.4% were paid or settled within 30 days after receipt by L&N. An additional 18.7% were disposed of within 30 to 90 days after receipt, so that only 8.9% of the claims received from claimants remained unpaid in excess of 90 days after receipt by the L&N.

A comparison of the number of claims filed and amicably resolved by the L&N with the number of lawsuits pending shows that the overwhelming majority of claimants are satisfied with the way in which claims are handled by the L&N.

The present docket of pending freight claim suits in which L&N is a named defendant is representative of the average number of such suits that have been in litigation during the years that I have been affiliated with the Freight Claim Department. At the present time there are but 21 such suits pending in state and federal courts throughout the eastern half of the United States. 8 of these suits involve alleged damage to fruits and vegetables. Of these, 4 are pending in the courts at Chicago and the plaintiff's attorney in each case is the attorney for the perishable claims adjusting agencies located in Chicago which are among the major proponents of this proposed litigation. In the 6 years that I have been the Freight Claim Agent, despite the fact that it has had few suits, L&N usually has had a suit pending in the Chicago municipal courts in which this same attorney was the plaintiff's attorney. Many of these cases involve shipments not even remotely related to Illinois, except that the claims handling agency had its office in Chicago. So routine has this attorney's practice become in the handling of claims for damage or delay of fruits and vegetables in transit that he utilizes a mimeographed complaint form in which appropriate blanks are filled in to identify the claimant, the shipment and the defendant railroad.

Of the above 21 lawsuits, 2 now pending in the United States District Court at Memphis involve an identical question relating to the amount of damages payable for unexplained fire damage to cotton. The real party in interest in both of these cases is an insurance company, and the issue involves L&N's contention that the maximum amount recoverable is the fair market value of the cotton or the purchase price agreed upon between the seller and purchaser, whichever is less. The insurance company contends that the fair market value should govern even in those instances where the market value exceeds the actual value of the cotton as represented by the agreed purchase price.

L&N expects to establish its non-liability in five of the remaining cases. The others involve questions relating to the amount of damages recoverable. In one case the lawsuit was precipitated by the owner's refusal to supply information supporting the amount of claim. This case has now been settled after L&N utilized the pre-trial discovery procedures available to it. This case soon will be dismissed as settled.

It is obvious from the above that only a very small percentage of the freight claims filed against L&N ever become involved in litigation. In terms of numbers of suits filed, the great bulk are those arising out of transportation of fruits and vegetables. Such lawsuits are controlled by several large claimhandling organizations centered in the large metropolitan areas, primarily in Chicago. Our own experience has been that lawsuits of this type usually seek damages of less than $500.

Railroad carriers are charged with the duty of fair and impartial investigation and settlement of freight claims. It is our practice to defend lawsuits only when the demands made by the claimant are unreasonable or exceed the general bases on which such claims are negotiated by the L&N among its claimants, or when the claim raises a serious question of carrier liability. It is not unusual for the actual expense to the L&N of defending such cases to substantially exceed the amount in controversy. Litigation of this type is conducted for the purpose of clarifying the law. When the points in dispute are clarified, these become precedents in resolving future claims.

My own judgment is that if S. 1653, HR. 9681, or some similar bill is enacted by Congress the railroads will do one of these: They will either forgo the defense of claims where the investigation indicates payment would be unjust, or the present practice of defending appropriate cases will be continued and the increased litigation expense added to the total cost of handling freight claims. In either event the increased cost must ultimately be passed on to the shipping public through increased freight rates. The real issue presented by the proposed

legislation is whether there is sufficient justification to warrant that increased cost and whether it will result in a better state of affairs in the transportation of property. My own opinion is that on both counts the proposed legislation receives an emphatic NO.

Many claims are adjusted on a compromise basis by the L&N either because there is a substantial question as to liability or because the amount of damages claimed is in excess of what the shipper is able to support by objective evidence. Claims involving the amount of damages of this type are often resolved by compromise when the carrier has had an opportunity through the use of court enforced discovery procedures to obtain from the plaintiff what real evidence it has concerning its loss. Since, in those cases, the plaintiff would be successful he would be entitled, under the proposed legislation, to attorneys' fees even though the amount of the settlement or possible judgment would be substantially less than the amount demanded in the claim. This bill would encourage the prosecution of lawsuits arising out of claims relating to the amount of damages due.

The litigation problems relating to the handling of claims for damages or deterioration or loss of market value in the transportation of fruits and vegetables should not be considered as part of the total problem to the payment of freight loss and damage claims. Perishable claims have had a special history, have received special attention by the Interstate Commerce Commission, are subject to peculiar regulation within the railroad industry because of their history and are further complicated by the auction market sale to which most of these shipments are subject upon arrival at destination. I believe that something must be done to simplify the investigation and adjustment of perishable claims. I do not believe that the passage of the proposed legislation which undoubtedly would result in a flooding with lawsuits of the courts in such cities as Chicago, New York, Philadelphia and Boston will lead to any acceptable solution of the problem. Rather, a dispassionate investigation of this field of freight claims handling by the Interstate Commerce Commission looking toward a great simplification of the existing rules would appear warranted.

Finally, I call attention to the fact that the Interstate Commerce Act charges common carriers subject to it with the duty to investigate and pay only those claims which are justified by the evidence presented by the claimant and which can be otherwise obtained. It is a practical reality that if shippers file suits, which I believe many will, for small claims upon which payment would be unjustified, most carriers would simply confess judgment rather than incur the risk of substantial attorneys' fees. The practical result will be that small claims will receive more favorable treatment than those involving substantial sums of money.

I am convinced that the proposed legislation cannot be justified on any objective basis. The L&N and the railroad industry generally, with a few temporary exceptions, have maintained an outstanding record of prompt claims payments. The aim of this proposed legislation is to force the payment of small, unjustified claims and claims the amount of which cannot be supported by objective evidence.

I urge that the proposed legislation not be enacted.

FREIGHT CLAIM DIVISION—COMPARATIVE TABLE, YEARS 1969-68

Claims	1969		1968		Increase or decrease (—)	
	Number	Amount	Number	Amount	Number	Amount
Received direct from claimants	42,915	$8,192,807	39,266	$6,286,620	3,649	$1,906,187
Received from other carriers	82,607	2,827,672	82,862	2,523,186	—255	304,486
Total claims received	125,522	11,020,479	122,128	8,809,806	3,394	2,210,673
Withdrawn or declined	3,472	1,260,675	2,211	591,048	1,261	669,627
Settled with claimants	39,703	[1] 5,927,414	36,541	[1] 4,563,178	3,162	1,364,236
Paid to other carriers	82,607	[2] 2,827,672	82,862	[2] 2,523,186	—255	304,486
Paid within 30 days (percent)	72.4		71.5			
Salvage proceeds		1,647,155		1,410,016		

[1] A substantial part of this amount will be recovered from other carriers participating in the transportation of the shipments involved, and will be further reduced by amounts realized from the sale of damaged and rejected shipments.
[2] Subject to adjustment under freight claim rules.

FREIGHT CLAIMS RATIO

During 1969 the Freight Claim Division closed claims files representing a net cost of the L&N of $5,315,812. Included therein were claims filed and paid during 1969 and prior years. The ratio of the cost of these closed-out claims to L&N's estimated 1969 freight and switching revenues of $328,000,000 will be approximately 1.60%. This compares with a ratio of 1.55% for 1969.

Mr. ADAMS. Now, Mr. Hennessey, you may proceed.

Mr. HENNESSEY. I will say the major part of the grain shipments are weighed at the shippers facilities at the elevator, and the same thing applies to destination. Most of them are not even taken over track scales. They are used in what they call hopper scales in the headhouse at the top of the grain elevator. The grain is weighed there, conveyed on a conveyor to the boxcar, and blown in, and the same thing transpires at destination, when unloading. It is conveyed from the car to the headhouse, and they are taken in usually 160-pound draft weights, and then you have so many at 160, 30 to a car.

Mr. KUYKENDALL. And you are allowed so much tolerance, like the one-eighth of 1 percent, where you are allowed loss without problem at all?

Mr. HENNESSEY. Normally, all of these scales, with the exception of country elevator points, are supervised by weighing and inspection bureaus in different parts of the country. You have the Eastern, Southern, and Western, and so forth.

Mr. KUYKENDALL. If you came here with a loss of 5 percent on a rail car, in this case it is a practice for you not to know what you are accepting. Is this correct?

Mr. HENNESSEY. With grain, we only know what we accept when you get the claim papers at a later date, if a man makes a protest and feels he has a claim. That is generally when we know what we are required to pay on a grain claim.

Mr. KUYKENDALL. No wonder the railroads are about to go broke, if they have to accept something and don't know what it is.

I think you can judge, if you were here this morning, that we are not likely to come up with a bill here that allows you to get charged with a lawyer's fee on one side and not have a reciprocation. I may lose the fight in the committee, but I can assure you that we are not going to let the legal profession off scot free on this one, if I have anything to do with it, and I can't guarantee more than one vote on anything.

But this is what troubles us. There have been no complaints against the motor freight people. They had some very constructive suggestions as to how they would like to amend this bill, and a couple of them we are going to try to take, if we can.

But I am troubled, and I think particularly in this area of the scrap metal, because that is one nobody can understand, how you can lose scrap metal. This was the one that bothered us most of all.

I am troubled that the whole industry seems to be dealing in such a totally intangible field here, the area of perishables. You yourself say that you really don't know how much grain you really accept. Therefore you end up, I guess, working the law of averages in the end.

Mr. HENNESSEY. Normally, the shipper bills the weight on the car when he takes out his bill of lading. We do know that.

Mr. KUYKENDALL. In the end, was the description the man made here on grain the way they used to handle it about your experience as to the way it used to be handled on the collection of claims? You know the man and go on his honesty?

Mr. HENNESSEY. I represent the L. & N. Railroad. We still honor claims on that basis, whether it be steel scrap, or grain.

Mr. KUYKENDALL. Of course, there have been no customers of yours complaining, that I know of, here. Maybe that is the reason they are not complaining.

Mr. HENNESSEY. It could well be.

Mr. KUYKENDALL. The good southern railroads operate better.

Thank you, Mr. Chairman.

Mr. HENNESSEY. There are a couple of other points.

Mr. ADAMS. I was going to say, Mr. Hennessey, I thought that you might want to make a little statement, whether you want to read it or summarize it.

Mr. KUYKENDALL. Let me summarize, Mr. Chairman. I do have to go.

Here is my feeling as to what I would like to see. I want to tell you the three points that were discussed this morning:

No. 1, I think that there should be a recoverable lawyer fee by a successful plaintiff if he recovers 5- to 10-percent more than was offered him before the case, if there is a ruling by the judge that the evidence was not substantial for the case in the first place, the judge would have a right to rule the reverse, that the plaintiff would have to pay the fee, and lastly, that the amount of the award must be related, doesn't necessarily have to be the same as or less than, but at least must be related to the size of the claim.

This means that you couldn't go from $100 to $1,000, but it doesn't mean that you couldn't go from $100 to $200, as discussed this morning.

Gentlemen, that is the way I see this thing. I think that this case is big enough, from what I can see, that there has to be some access to this claims situation.

However, I am against making it a one-sided situation totally.

Thank you, Mr. Chairman. I am sorry to leave.

Mr. ADAMS. Go ahead, Mr. Hennessey.

Mr. HENNESSEY. One other point raised this morning by Mr. Kuykendall with respect to when a summons and complaint is issued: It is not unusual, in fact I have one on my desk at Louisville right now, where there are 11 separate counts made. The shipments all originated from the same point, but they were on single bill of lading contracts, all going to 11 different points.

So that it is not unusual to receive litigation of that nature, where there might be even as high as 20 or 25 counts on each individual separate bill of lading movement. I have seen them. Normally they are from the same shipping point, but there are various destinations.

Mr. ADAMS. Are you self-insured, in effect? In other words do you use an insurance company, or do you use your own agents to settle, and then your own house counsel to litigate, if that is required?

Mr. HENNESSEY. The L. & N. is the same as most common rail carriers, self-insured through their rate structure.

We do carry a very high deductible in the event of a major derailment, tank car or gas explosion, or something of that nature, but in

the last 4 years, to my knowledge, we have never applied it. I think it is about $1 million deductible.

Mr. ADAMS. I direct this to both of you gentlemen. Do your shippers substantially buy insurance of their own, over your roads, or do they pretty much rely upon whatever protection they have received from settling claims with you?

Mr. WILEY. They rely on the protection in settling the claims with the carriers, is my experience.

Mr. HENNESSEY. To my knowledge, Mr. Adams, the only time that comes into common play is on cotton shipments. In every cotton fire the L. & N. has ever had, the insurance company has exercised subrogation rights from their people that pay them the premium, and then they come to us for the claim value.

Mr. ADAMS. In other words, with cotton shipments, the farmer or the shipper has insured it himself?

Mr. HENNESSEY. Yes, sir.

Mr. ADAMS. Then if there is any claim, then his insurance company comes to you, but you do not have an insurance company that deals with him. You, the company, deal with him.

Mr. HENNESSEY. No, sir. We deal direct with the insurance company.

Mr. ADAMS. I mean you deal directly with the insurance carrier on the goods.

Mr. HENNESSEY. Correct; yes, sir.

In a few instances we have had some high-value machinery shipments, where during the course of our investigation we developed there was a possibility of insurance coverage, and then, under the pertinent section of the bill of lading contract, of course, a carrier has the benefit of insurance coverage, providing they pay the premium.

But in all cases that I have seen, including cotton insurance, there is a clause that knocks that out, as far as that particular section of the bill of lading.

Mr. ADAMS. In answer to an earlier question, where Mr. Kuykendall had mentioned about an arbitrary claims settlement basis that went into effect in 1966, do either of you gentlemen know what that was?

Was there a statement to the departments that were handling these claims that they were to be handled in a particular fashion, as I say, an arbitrary claims-settlement basis? Do either of you gentlemen know of this?

Mr. WILEY. It didn't occur on our railroad, Mr. Adams.

I think that there may have been one or two of the eastern carriers which adopted a somewhat more restrictive claim processing procedure in relation to some grain claims, but this was not a so-called policy that applied to all carriers at all, sir.

Mr. ADAMS. Do you know about that, Mr. Breithaupt? I do not.

Mr. BREITHAUPT. I have attended all of the hearings on the Senate side, Mr. Adams, where this proposal has been active for a number of years, and on the basis of the record made there, it would appear that certain eastern rail carriers at about 1966, about that time, decided upon a settlement procedure of what might be called a formula in the matter of loss-in-transit claims for grain. The formula at which they arrived, according to the record made, of which I have no personal

knowledge, made the settlement depend upon whether the weight was official at origin and destination, unofficial at one or both ends, shippers' weight at one or both ends. It had largely to do with what kind of weight was obtained at origin and destination.

Whether that policy is still in effect, I don't know, and I don't know that it ever was. I am just reciting from the record on the Senate side.

Mr. ADAMS. I see.

I think you, Mr. Hennessey, made a statement in the middle of Mr. Kuykendall's questioning about shippers' weight and count, and the manner in which you handle grain. That wasn't quite clear to me. Do you handle your grain on the shippers' weight and count basis?

Mr. HENNESSEY. Yes.

Mr. ADAMS. Then how does the claim arise, if you are operating on that basis?

Mr. HENNESSEY. It is merely a difference between origin shipping weight and destination unloading weight.

Mr. ADAMS. But if it is shipper's weight and count at both ends, how does he manage to establish a claim, then?

Mr. WILEY. It is prima facie evidence. We have to rebut it from that point on.

Mr. ADAMS. This is what I am getting at. In other words, ordinarily, with shipper's weight and count, it is almost impossible to develop a lawsuit, because you have to take completely on faith his original weight and count, and any mistakes that he makes counts against the transportation company, so that with shipper weight and count, you generally do not allow suits for differences in weight and count, if he weighs at both ends.

You are explaining to me, as I understand it, that you take his weight and count at origin.

Mr. HENNESSEY. Of course, as I further explained, all of these weights are supervised by bureau personnel.

Mr. ADAMS. What do you mean by that?

Mr. HENNESSEY. In the South we have the Southern Weighing and Inspection Bureau.

Mr. ADAMS. That is run by whom?

Mr. HENNESSEY. It is a railroad-affiliated organization.

Mr. ADAMS. I see.

Mr. HENNESSEY. After they have gone in and made a complete inspection of all the facilities, unloading, loading, scaling, weighing methods, they then ship under bureau-approved weights, and these are normally accepted for the assessment of freight charges.

So that if they are good for that, then I certainly think it follows that they would be good for claim purposes.

Mr. ADAMS. Are they also available at the other end?

Mr. HENNESSEY. In most cases; yes, sir.

Mr. ADAMS. I see. So that is your check system on it plus the integrity of the shipper.

Mr. HENNESSEY. Yes, sir. If we have nonbureau supervised at one end or the other, we normally compromise the claim, usually on a 50-percent basis

Mr. ADAMS. How is the bureau made up or created? You mentioned that it is railroad affiliated. Do the railroads through an association hire a group of people to do this, or are they hired on a part-time basis,

or do they travel, or just how is it created? Because apparently, you see, from the record that we have, the genesis of this bill in the Senate side is involved with perishables and grain shipments and household goods, and this kind of thing. That is why the questioning to you gentlemen has gone to these specifics.

Mr. HENNESSEY. I just don't know the structure.

Mr. WILEY. Some of the weighing is supervised by chambers of commerce.

Mr. HENNESSEY. A lot of them, yes.

Mr. WILEY. Board of trade, chamber of commerce.

I am not a grain expert. I would prefer Mr. Hennessey to answer that, but I do know we handle some grain, and they do have boards of trade and the chamber of commerce, and they have a sworn weighmaster, and then he has to supervise about—and I am not sure of this—one out of every 10 or 15 cars, or something like that, just to confirm that the weighing procedure is substantially correct.

When we say they are supervised weights, it doesn't mean that every single car is supervised, or the weighing procedure. It means maybe one or two cars a day are supervised, and then we are assuming that the rest of the weights are accurate.

Mr. HENNESSEY. Mr. Adams, all of this goes back to this investigation that was referred to by Mr. Hansen, ICC docket 9009, back in 1918, 1919, or 1920.

Mr. ADAMS. And it has been previously testified that they are looking into this again, so that I think the committee at some point will have available the results of their investigation.

I just have one last question to you gentlemen. That is, you mentioned the claim-shark operation that apparently is existing, and that claims are filed on every item. In what parts of the country is this occurring, and what position has been taken with regard to this by the railroads and others with the local bar associations?

Mr. HENNESSEY. I have a little information on that in my statement, if I might refer to that.

The L. & N. being predominantly southeastern to Chicago now, we handle quite a few perishables in connection with the Seaboard out of Florida, and handle a lot of potatoes out of our Foley branch down in Alabama.

On page 4 of my statement, we have at the present time on hand 21 suits pending in State and Federal courts throughout the eastern half of the United States. Eight of these suits involve alleged damage to fruits and vegetable.

In the 6 years that I have been the freight claim agent, despite the fact that it has had few suits, L. & N. usually has had a suit pending in the Chicago municipal courts in which this same attorney was the plaintiff's attorney. Many of these cases involve shipments not even remotely related to Illinois, except that the claims handling agency had its office in Chicago.

So routine has this attorney's practice become in the handling of claims for damage or delay of fruits and vegetables in transit that he utilizes a mimeographed complaint form in which appropriate blanks are filled in to identify the claimant, the shipment, and the defendant railroad.

I would go along with Mr. Wiley, that probably 60 percent of our claims on fruits and vegetables are handled by claim sharks, predominantly in the Chicago area. The other big ones are Philadelphia, New York, and Boston.

Mr. WILEY. Mr. Adams, in New York, which, of course, is our largest perishable receiving market, and Boston, another very large market, almost 100 percent of the perishable shipments arriving in those markets are automatically protested.

They have a regular inspection agency retained by the consignees, and on each and every car that arrives there, there is immediately handed to a representative of the rail carrier, in the case of New York and Boston, the RPIA, railroad perishable inspection agency, and they file a protest.

Whether there is a loss, whether there is decay, whether there is delay, whether there is anything wrong with that shipment at all, that car is automatically protested, and the protest carries, "This is our notice of claim."

In those cases, the courts have held, and we have tried to get it knocked out, that those protests are valid, and they are good, and they perpetuate that claim virtually forever, or until that claim is disallowed, and then that protest, which is an unsupported claim, is good until it is disallowed or just fades away.

Mr. ADAMS. Isn't there a statute of limitations on those, Mr. Breithaupt?

Mr. BREITHAUPT. Nine months from the bill of lading, in which to file a claim. Then 2 years which runs from the time the carrier acts.

Mr. HENNESSEY. Section B stipulates that the claim must be filed within 9 months of delivery, but the courts have held that that——

Mr. WILEY. Makes it good until that protest is disallowed, and then it is good for 2 years and a day beyond that.

Mr. HENNESSEY. Once it is disallowed by the claimant carrier.

Mr. WILEY. I have claims which are filed with my company over 4 years after the delivery, many of them. Four years after the produce has been delivered, claims are filed, using that protest.

The protest is filed with the destination carrier, and then often the claim is filed with the origin carrier. It makes it almost an impossible task to handle the claim.

What could be done is that we could automatically disallow each and every protest but that might result in chaos, too, because if the shipper were to file a good, valid claim on it you would wind up with a claim that had been disallowed at destination, and the two would conflict, and quite possibly you would hit the 2-year limitation period, and a good, valid claim would go down the drain because it had been disallowed.

Mr. HENNESSEY. The whole intent, according to my understanding of the nine months limitation in the ICC 20(11), was to give the carrier an opportunity to develop its record from timely information.

Mr. ADAMS. Does the 9 months apply both at the destination and at the origin?

Mr. WILEY. Yes, sir.

Mr. HENNESSEY. It is 9 months from date of delivery at destination.

Mr. WILEY. A claim must be filed in writing within 9 months from the date of delivery.

Mr. ADAMS. But you have just told me that if the claim is filed at destination, that it, in effect, keeps alive the claim at both ends.

Mr. WILEY. Yes, sir.

Mr. ADAMS. For whatever the period of the statute of limitations is on that, and I think you indicated it was, did you say 2 or 4 years?

Mr. HENNESSEY. Two years and 1 day.

Mr. WILEY. If the protest is filed, and no action taken on the protest, the claim is then good forever.

Mr. ADAMS. Then it is good forever?

Mr. WILEY. Indefinitely; yes, sir.

Mr. ADAMS. Do you have a practice of reviewing these and allowing or disallowing them within a particular period of time?

By that I mean a practice within the railroad industry.

Mr. WILEY. No; there is no hard and fast practice, Mr. Adams.

Mr. ADAMS. Are these referred to you by the destination carrier?

Mr. WILEY. No, sir. They are filed on every single car. We ultimately only get claims on about 25 or 30 percent of those, but all of the shipments are open and they can file claims any time they want.

It really amounts to a sharp practice. They have extended the period of their filing procedures beyond that which the law really intended.

Mr. ADAMS. Mr. Breithaupt, can this be handled by ICC regulation, or does it require a change in the statute?

Mr. BREITHAUPT. After hearing the story from these gentlemen some months ago, I did a little research, and I think it would have to be statutory, Mr. Chairman, because the tolling of the statute that has been mentioned here has been upheld by State courts and the like. I just don't believe the ICC would be able to get at it. I don't think it would take a statute.

Mr. WILEY. We brought up the specific question in a court in Boston, and we did not prevail.

Mr. ADAMS. Mr. Dixon has a question.

Mr. DIXON. I don't want to prolong this, and I think we can pursue this further off the record.

I would like to hear more about this 9 months, and how it is tolled, and as one witness said, it can go on forever.

Is it more a protest, or else a notice that a claim may be filed?

Mr. WILEY. I have some copies of the protest, if you would like to see them, Mr. Dixon.

Mr. DIXON. It raises the argument that perhaps the 9 months is too short.

I think if you use the 9 months as a statute of limitations, it would be shorter than most statutes of limitations for causes of action for contractual breach throughout the country.

Mr. BREITHAUPT. The 9 months is only the minimum period that the carriers may prescribe for filing of the claim.

Mr. DIXON But if no claim is filed for 9 months, the prospective claimant is out.

Mr. BREITHAUPT. Under the contract.

Mr. DIXON. Perhaps if the 9 months were extended, we might get away from this tolling of the protest.

Mr. BREITHAUPT. I am not prepared to say.

Mr. DIXON. OK.

Thank you.

Mr. ADAMS. Thank you, gentlemen.

Mr. BREITHAUPT. Thank you, Mr. Chairman.

Mr. WILEY. Thank you, Mr. Chairman.

Mr. HENNESSEY. Thank you.

Mr. ADAMS. These hearings are adjourned, subject to the call of the Chair.

(The following telegrams, statements, and letters were received for the record:)

[Telegram]

CHARLESTON, W. VA., *September 28, 1970.*

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, Rayburn House Office Building, Washington, D.C.:

The Diamond Department Store receives merchandise from all parts of the United States and many foreign countries. We feel there is an increasing need for the interstate commerce authority, or some other Government agency other than the courts, to control or regulate the handling of freight claims by common carriers. There seems to be an increasing number of carriers that are taking a longer period of time in settling their claims, many settling only a short time before the statute of limitations. The most recent problem is the arbitrary exposure factor that has been formulated by interstate truckers limiting their liability on concealed damages.

We feel some basic control in this area needs to be established as quickly as possible. It is requested that this statement be made a part of the record of the public hearings held by the Subcommittee on Transportation and Aeronautics.

R. M. CLEAVENGER,
Vice President and Treasurer, Diamond Department Store.

[Telegram]

CHARLESTON, W. VA., *September, 29, 1970.*

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, Rayburn House Office Building, Washington, D.C.:

The membership of the Charleston Downtown Association is made up primarily of businesses that have a great number of transactions with common freight carriers. Our members are very disturbed with the manner in which the common carriers are handling their freight claims. The most recent problem is the exposure factor that was arbitrarily formulated by interstate truckers limiting their liability on concealed damages. Some basic control of this area of operation of interstate carriers needs to be established by the interstate commerce authority as quickly as possible. It is requested that this statement be made a part of the record of the public hearings being held by the Subcommittee on Transportation and Aeronautics.

CHARLESTON DOWNTOWN ASSOCIATION.

[Telegram]

ST. LOUIS, MO., *September 29, 1970.*

HON. HARLEY O. STAGGERS,
Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.:

Merchants Exchange of St. Louis representing parties handling grain, grain products and related articles in St. Louis area endorses the attorneys fee bill, S. 1653, as it passed the Senate and is now before your committee. The shipping public today is not being protected when loss or damage occurs to property transported. Legislation is needed as the injured party is deprived of their party when suits for loss and damage dissipate redress through cost of attorneys fees Generally the law provides that injuried parties should be made whole and this is not possible today. S. 1653 as amended would remove this inequity and should

be passed favorably by your committee. Respectfully request you inform your committee of position of grain shipping public in St. Louis area.

MERCHANTS EXCHANGE OF ST. LOUIS,
JOSEPH C. WISE, *President.*

STATEMENT OF WILLIAM J. AUGELLO, JR., TRAFFIC COUNSEL, SOCIETY OF AMERICAN FLORISTS

The Society of American Florists and Ornamental Horticulturists with headquarters at 901 N. Washington Street, Alexandria, Virginia (formerly at the Sheraton Park Hotel, Washington, D.C.), hereby supports H.R. 9681, H.R. 8138, H.R. 8609, H.R. 9072, H.R. 14017, H.R. 17367 and S. 1653 to amend the Interstate Commerce Act by permitting the recovery of reasonable attorney's fees in case of successful maintenance of an action for recovery of damages sustained in transportation of property subject to Section 20(11) of said act.

The Society is a federated national trade association comprised of 182 affiliated associations representing thousands of firms engaged in all segments of the floral industry. The industry's primary movement consists of small shipments of cut flowers, nursery stock, decorative greens, and related commodities. It follows, therefore, that its claims for loss, damage or delay of such shipments are in relatively small amounts.

Since litigation of declined claims in small amounts is not economically feasible, the carriers utilized by the floral industry naturally weigh this factor in determining whether to voluntarily pay claims. As a result, the industry loses thousands of dollars in unrecoverable claims annually.

The proposed legislation will certainly induce carriers to seriously consider the merits of each and every claim irrespective of the amount thereof and the likelihood of a suit being instituted to enforce collection.

Furthermore, the originating or delivering carriers participating in joint movements of floral products are permitted to recover reasonable attorney fees from connecting carriers upon a judgment in favor of a plaintiff pursuant to Section 20(12) of the Interstate Commerce Act. It appears to be reasonable to permit the successful plaintiff to recover reasonable attorney fees under the same circumstances.

Accordingly, the Society of American Florists wholeheartedly supports the passage of H.R. 9681, H.R. 8138, H.R. 8609, H.R. 9072, H.R. 14017, H.R. 17367 and S. 1653.

STATEMENT OF JOHN E. HARVEY, DIRECTOR OF TRANSPORTATION, ARCHER DANIELS MIDLAND CO.

Archer Daniels Midland Company is an agribusiness industry engaged in handling, merchandising, and processing grains, soybeans and flaxseed. Our products enter nationwide domestic distribution as well as worldwide export channels. Our product value exceeds $400 million per year, being transported predominantly by common carriers subject to the Interstate Commerce Act, causing our interest in this cause to be real and genuine. We previously have addressed the members of your Interstate and Foreign Commerce Committee on this matter, and I attach copies of two such letters for your ready reference.

As active members of the National Industrial Traffic League and the National Grain and Feed Association, who will both present testimony before your Committee at this hearing, we adopt their statements and positions as our own.

In addition, we add our statement of position. Simply put, we hold that when we load our commodities into equipment designated as suitable by the carrier, and upon completion of loading enter into a transportation contract with that carrier for movement to ultimate destination, and our commodity does not reach our customer in the same quantity, quality and condition as when loaded, and carrier negligence can be proven, we are monetarily damaged if the carrier does not make us whole to the same extent as if the commodity had arrived as loaded. This is embodied in the common as well as as the statutory law. Too often, and with increasing frequency, are we denied this right. Our only forum for reasonable treatment is our courts. This legislative amendment will allow the damaged shippers their opportunity to have that forum to collect their due monies without further costs. It is in all respects in the public interest.

To indicate how the shipper is damaged by the carriers' refusal to make him whole on his business transaction which involve movement by the carriers, only one example is needed.

The normal net profit for handling grain is variable, but 2 to 3 cents per bushel is considered good. A boxcar is usually considered capable of holding 2000 bushels (60 pounds/bushel) or 120,000 lbs. We experience many claims for 500 bushel and more loss. At a 2 cent net margin per bushel, the normal boxcar generates $40 profit. A 500 bushel loss in transit, with grain valued at $2 per bushel causes a loss to us of $1000. If the car had arrived at destination with no loss, we would have made $40. In order to recoup our profit of $40, with an unsettled or declined claim of $1000, we must sell an additional 50,000 bushels of grain at the same price—*with no profit!* That is, we must sell an additional *25* cars of 120,000 lbs. each, at no profit (50,000 × $.02 = $1000). This fact has equal but in many cases more dramatic consequences on every commodity shipped. If we undergo litigation and our court costs are added, we could never come out even.

We, as well as all other shippers, have numerous claims rejected, or on which the carriers offer a token settlement, that we cannot afford to litigate—and carrier negligence was proven.

The attached Illinois Central claims policy is but one example of what we face.

We most respectfully and strongly urge your Committee to pass this bill as it reads—to the floor—for action and approval this Congress.

ARCHER DANIELS MIDLAND CO.,
Decatur, Ill., February 3, 1970.

Hon. ———,
House of Representatives,
Washington, D.C.

DEAR MR. ———: On January 26, the Senate passed, with committee amendment, S. 1653, SHIPPER'S RECOVERY OF A REASONABLE ATTORNEY'S FEE, for your action. In brief, this bill provides for amendment of section 20(11) of the Interstate Commerce Act, 49 U.S.C. (20), to enable a court, in its discretion, to allow a reasonable attorney's fee to a plaintiff in a successful action in that court in matters arising out of suits against common carriers subject to the Act for recovery of damages resulting from carriers negligence. We entirely support the amended bill, and suggest that Senate Report No. 91-631, Calendar No. 624, dated December 22, 1969, is an excellent recitation and justification for passage of this bill.

We can add little to Senate Report No. 91-631, except to reiterate the arbitrary claims settlement policies of the various carriers, set forth in that report, which limit the carriers liability under common as well as statutory law. At this time it is not economically feasible to litigate claims for recovery of damages unless a precedent can be established which will enable collection of damages on shipments with similar attendant conditions on subsequent dates.

Since the hearings before Senate Sub-Committee, certain Western railroads have instituted comparable claims policies as the Eastern railroads set forth in Senate Report No. 91-631. The urgency of this legislation cannot be overstated. The equities which will flow from the bill are required.

We urge your favorable passage, in this Congress.

Yours truly,

JOHN E. HARVEY,
Director of Transportation.

* * *

ARCHER DANIELS MIDLAND CO.,
Decatur, Ill., April 30, 1970.

HOUSE OF REPRESENTATIVES,
Washington, D.C.:

On February 3, last, I addressed you regarding H.R. 9681, the House version of S. 1653 then passed and cleared by the Senate to your committee.

I expressed our deep and continuing concern over this most important matter and of progressing this bill to passage in this Congress.

Matters have by no means been simplified in regard to reasonable claims collection and the protection of the shipping public.

In the interim, the Interstate Commerce Commission has concluded to investigate the matter of claims payment and carriers procedures in their case designated Ex Parte No. 263. The ICC has further concluded to treat a petition for

Declaratory Order filed by the American Feed Manufactures Assn. and the National Soybean Processors Assn., and designated as I.C.C. Case No. 35220. In addition, my company has been forced to file a formal complaint with the ICC against the Burlington Northern, Inc. (CBQ Division) to resolve an arbitrary—and unreasonable departure from published tariff provisions by that railroad which deprives us of monies on lost commodities.

The most compelling reason for this legislation is to provide adequate protection to the shipping public. Above mentioned are three fresh cases before the I.C.C., yet the I.C.C. lacks the jurisdiction and authority to handle claims matters—other than those dealing with specific provisions published in tariffs on file with that Commission. In most instances, where the shipping public stands aggrieved, it is the result of arbitrary claims policies instituted by the carriers in the very face of the common law. Our only recourse is to file suit in the courts and have the issues litigated, and in most cases the expense of such litigation does not even begin to offset damages awarded by the court.

While we can fully appreciate the work load of your Committee, it would appear that as long as this issue has been in the various stages before the respective Senate and House committees—and now that it has cleared the Senate—we should look forward to early action by your Committee.

We urge such action to allow this bill to be heard in this Congress.

Yours truly,

JOHN E. HARVEY,
Director of Transportation.

* * *

ILLINOIS CENTRAL RAILROAD,
FREIGHT TRAFFIC DEPARTMENT,
New Orleans, La., July 31, 1969.

The following claim settlement policy will become effective with claims received after August 1, 1969:

1. Clear record cars with official Class I and Class II weights at origin and destination—fifty (50%) percent maximum payment.
2. Clear record cars with one Class I or Class II official and one unofficial weight—twenty-five (25%) percent maximum payment.
3. On a car with leaking grain door, if the door is applied by the shipper—fifty (50%) percent maximum payment. If leak over grain door—no payment.
4. On car with grain reported behind the lining—decline. If lining noted defective—fifty (50%) percent payment.
5. Clear record cars with unofficial weights at origin and destination—decline.
6. Cars with defective seals will be considered clear record unless noted leaking.
7. Cars with leak at door post are to be considered as per item three (3) if installed by shipper.
8. When defective equipment is noted at destination the destination carrier must be notified to allow for verification and correction.

By "clear record" is meant where there is no record of any loss occurring by leakage or otherwise. Formerly we were paying 100% of such claims.

STATEMENT OF JOHN G. MOHAY, EXECUTIVE VICE PRESIDENT, NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION

Mr. Chairman and Members of the Committee, my name is John G. Mohay. I am Executive Vice President of The National Independent Meat Packers Association with offices at 734 15th Street, N.W., Washington, D.C. Membership in our Association is generally comprised of those hundreds of meat packers—slaughterers and/or processors—who operate a single plant and serve only a community or region of the country, as contrasted to those meat packing companies having plants in various areas over the country, and national or near national distribution of their products. Our members can best be described as small business operating in an industry that traditionally and recognizably is one of fierce competition and low margins.

We are pleased to have the opportunity to express our views in support of S. 1653, which would amend Section 20(11) of the Interstate Commerce Act so as to provide for recovery of a reasonable attorney's fee in case of successful

maintenance of an action for recovery of damages sustained in transportation of property.

Over the past ten years the meat slaughtering and processing plants, formerly concentrated in large urban areas, generally have moved to country points, so as to be closer to the source of livestock production. This geographic upheaval has made it absolutely necessary to have fast, prompt, and reliable service in transporting the meat and meat products of our members into the cities for ultimate consumer distribution. For meat and meat products, obviously, require all the care and speed in transit of any other perishable commodity.

Under optimum conditions of refrigeration, motor carriers, for example, can deliver dressed meats from slaughtering plants in the Midwest to large markets as distant as New York or Los Angeles in good shape in less than three days. However, when the ordinary course of business is disrupted by factors beyond the control of the meat packer, but which can be directly attributed to the carrier of his product, we believe a claim for compensation by the packer should be honored.

The trouble, however, as many of our members unfortunately have found, is that the carrier frequently is not disposed to honor such a claim and, in such instances, the only alternative course of action open to the packer is to engage the services of an attorney to institute litigation to collect damages for the loss sustained.

In instances where the claim is honored, it may take six months or longer for payment to be made; to have the price of several carloads of product tied up is financially undesirable.

The carriers seem particularly unwilling to honor, and sometimes even to process, claims involving relatively small sums. This we believe to be because the carriers are aware that the legal fees which the packer would have to pay his attorney to pursue such claims would not be justified, and in some cases would exceed the amount of the claim itself. Accordingly, the carrier can ignore the claim with impunity, for the packer, for all practical purposes, has no recourse.

We believe that the enactment of S. 1653 would serve to eliminate the inequity that presently exists between the shipper and the carriers in the settlement of such claims. It would give the shipper the needed impetus to litigate fully a claim when the shipper is convinced that he is in the right. Moreover, the carrier, we believe, would be more likely to treat such claims with a more understanding and open frame of mind rather than as at present, when the carrier need give only lip service to the shipper before denying a claim that the carrier knows is not of sufficient amount to warrant the legal expenses that would be incurred by the shipper in pursuing it through the courts. We also believe the enactment of S. 1653 would have the collateral effect of serving as a continuing reminder to the carrier that shipping delays, and damage to the shipped product, play havoc with orderly marketing, and that the ultimate result would be better service by the carriers and the reduction of the number of claims.

We wish to thank the Committee for giving us this opportunity to express our support of S. 1653. We sincerely hope that this legislation will be reported out favorably at the Committee's earliest opportunity to do so.

MERCHANTS SHIPPER CREDIT CORP.,
Bellevue, Wash., September 29, 1970.

Hon. HARLEY O. STAGGERS,
Chairman, House Interstate and Foreign Commerce Committee,
House of Representatives, Washington, D.C.

DEAR MR. STAGGERS: This is written in regard to H.R. 9681 and S. 1653, House and Senate Bills, respectively, concerning attorneys fees applicable on freight claim collections in actions instituted by shippers against carriers in interstate commerce.

We are enclosing a listing of our clients whom we have polled on the matter of permitting a successful plaintiff to recover his attorney's fee if he has allowed the carrier reasonable time to settle the claim. This poll has indicated 100% endorsement for the bill as passed in the Senate, which amends Paragraph 11 of Section 20 of the Interstate Commerce Act by inserting at the end of the 5th proviso and immediately before the 6th proviso the following: "And provided further, that the court, in its discretion, may allow a reasonable attorney's fee to the plaintiff in any successful action, to be taxed and collected as part of the

suit, but no such fees shall be allowed to the plaintiff except upon the showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and that such claim has not been paid within 90 days after receipt of the claim by the carrier or its agent."

We are enclosing a copy of the contract by which we have associated with each of the clients on the enclosed listing. Exercising our power of attorney to represent our clients before all hearings, courts, boards, or commissions, having authority to act or consider charges affecting their freight billing, we submit this letter as an affidavit for class action endorsing the Senate-passed version of attorney's fee Bill S. 1653, as amended, and urge the House Interstate and Foreign Commerce Committee to take immediate confirming action on this pending legislation.

On behalf of ourselves and our many clients, we wish to thank you for considering our position and viewpoint in this matter.

Very truly yours.

C. A. CRILEY, *President.*

LIST OF CLIENTS UNDER MERCHANTS SHIPPER CREDIT CORP.
BY CITY AND CUSTOMER'S NAME

Seattle:
Arthur Forsyth Co.
Aronson Industrial Snpply
AIMS Co.
Aqua-Quip Pool Supply
ABC Record & Tape Sales
Aimac-Stroum Electronics
Air Tec Co.
Kent:
Automotive Wholesalers, Inc.
Seattle:
Bentley Co.
Portland:
Brodie Hotel Supply of Oregon
Seattle:
Brodie Hotel Supply, Inc.
Black Manufacturing Co., Inc.
Bank & Office Interiors, Inc.
Kirkland:
Brennan Western
Seattle:
Blake Moffit & Towne
Burke Sales Co.
Bumstead-Woolford
Carrington Co.
Cascade Sales Co.
Colotrym Co.
Cummins NW Diesel Sales
The Commission Co.
C. A. Newell Co., Inc.
Continental Coffee Co.
Tacoma:
Coast Sash & Door Co.
Seattle:
CATV Eqnipment Co.
Dahnken Distributor
De Voss Desk Co.
Eddie Bauer, Inc.
Evans Engine & Equipment Co.
Emerson GM Diesel, Inc.
Emerson NW, Inc.
Flohr & Co.
Fentron Highway Products, Inc.
Fentron Industries, Inc.
Bellevue:
Fire Control Northwest, Inc.
Seattle:
Graybar Electric Co.
Griffin Envelope Co.
George S. Schuster Co.
Hays Merchandise Inc.
Bellevue:
H. D. Fowler Co.
Seattle:
H. K. Porter Co., Inc.
Herr Lumber Co.
Tacoma:
Hunt & Mottet Co.
Seattle:
Hussmann Northwest
Portland:
Hydraulic & Air Equipment Co.
Seattle:
Image Control Systems, Inc.
Insta, Inc.
The Instrument Laboratory
Jafco, Inc.
Jo-Lock Fabricators, Inc.
J. W. Phillips Dist. Co., Inc.
Bellevue: K. & N. Meats
Seattle: Lev Bak Trading Co., Inc.
Tacoma: Llanga-Pacific, Inc.
Seattle:
MacDonald-Miller Co.
Marine Construction & Design
Bellevue: Merry Go Round, Inc.
Seattle:
MacMorgan's Hallmark, Inc.
Mutual Materials
Manar Sales Co.
Modern Supply Co.
The Money Saver
Northwestern Hobby & Toy
Bellevue: Northern Merchandise Co.
Seattle:
Northwest Trading Corp.
Oversea Casing Co., Inc.
Olympic Foundry Co.
Oscar Lucks Co.
Portland: Platt Electric Supply, Inc.
Everett: Pacific Grinding Wheel Mfg.

Seattle:
Pacific Iron & Metal Co.
Plymouth Poultry Co.
Pacific Marine Schwabacher
Poison Co.
Kent: Pacific Propeller Co.
Seattle: Preservative Paint Co.
Marysville: Reinell Boats, Inc.
Seattle:
Reliable Distributors, Inc.
Roselia's Fruit & Produce
Roe Industries, Inc.
Redmond: Ridgway Lithograph Co.
Seattle: Ray Marine Distributing Co.
Redmond: Rocket Research Corp.
Seattle: Standard Controls, Inc.
Tacoma: Star Iron & Steel
Seattle: S. & J. Distributors
Bellevue: Sunset Northwest
Seattle: Stack Steel Co.
Kent: Tally Corp.
Seattle: T. & H. Co.
Kirkland: Tot Lines, Inc.
Seattle: Tyee Lumber & Mfg. Co.
Redmond: United Control
Seattle: Univalco Distributors
Bellingham: Unifilte, Inc.
Tacoma: United Supply Co.
Seattle:
Unique Zipper Dist. Service
Viking Automatic Sprinkler
West Coast Wholesale Drug Co.
West Coast Paper Co.
Washington Electronics, Inc.
Weisfield's, Inc.
Tacoma: Washington Hardware Co.
Seattle:
Washington Iron Works
Woodtape, Inc.
Kirkland: Western Prefinish Woodwork
Seattle: Young Corp.
Eugene: Young Iron Works of Oregon
Seattle: Zerego Distributing Co.

AGREEMENT

THIS AGREEMENT made and entered into this _____ day of _____, 19____, by and between MERCHANTS **SHIPPER CREDIT** CORPORATION, hereinafter referred to as "M.S.C.C." and _____, hereinafter referred to as "Merchant."

WITNESSETH:

NOW, THEREFORE, it is mutually agreed as follows:

1a. **Forwarding.** Merchant agrees to forward all freight bills received by it from a carrier, which are due and payable, to M.S.C.C. together with the entire amount of money claimed due on said freight bill by the presenting carrier prior to due date of said freight bill as set by law.

1b. **Payment to Carrier.** M.S.C.C. agrees to place all monies received from Merchant in payment of freight bills as provided in Paragraph 1a above, in a freight payment account. M.S.C.C. shall then audit the freight bills presented to it and correct the charges thereon where they are found to be incorrect under the terms of the applicable tariffs. M.S.C.C. then agrees to pay the freight charges, in the correct amount, to the carrier or the party named as Payee on the freight bills prior to the due date.

1c. **Records and Payment to Merchant.** M.S.C.C. shall then retain the amount of monies received by it on any freight bill in excess of the amount remitted by M.S.C.C. to carrier. Such excess shall be known as the "overcharge." M.S.C.C. shall keep accurate records of all of its operations and shall furnish Merchant each month with a statement showing the total amount of overcharge, and the amount due Merchant including discounts and duplicate payments if any. Six months from the end of the month in which M.S.C.C. paid any freight bill forwarded to it by Merchant, M.S.C.C. shall remit to Merchant any money held by M.S.C.C. in excess of the amount remitted by M.S.C.C. to carrier less the amount of M.S.C.C.'s fees and charges as provided in Paragraph 4 below and except as hereinafter set forth.

2. **Discount.** Merchant shall be entitled to a one per cent (1%) discount credit from M.S.C.C. on the face amount shown due on any freight bill, providing said freight bill, and the money shown due on it, are received by M.S.C.C. four (4) days prior to the due date of said freight bill, as set by law. Said discount shall be paid to Merchant at the expiration of the six-month period set forth in Paragraph 1c above.

3. **Duplicate payments.** M.S.C.C. agrees to refund in full to Merchant any and all duplicate payments received by M.S.C.C. upon discovery by either party. The refund of duplicate payments shall be remitted by M.S.C.C. to Merchant at the expiration of the six-month period set forth in Paragraph 1c above.

4. **Fee.** M.S.C.C. shall be entitled to the following consideration for its services:

(a) **Base Fee:** One hundred per cent (100%) of the overcharge of any freight bill presented to it by Merchant up to an amount equal to two per cent (2%) of the gross amount of money received by M.S.C.C. from Merchant during the calendar month in which said freight bill was audited.

(b) **Additional Fee:** One-half (1/2) of any overcharge on any freight bill in excess of the base fee.

This Agreement shall be subject to and include the additional provisions contained in the paragraphs shown on the reverse side hereof.

MERCHANTS **SHIPPER CREDIT** CORPORATION

By _____

Title _____

(M.S.C.C.)

_____

By _____

Title _____

(MERCHANT)

Definitions. As used herein, the following terms shall have the following meanings, respectively:

(a) "Freight bill" shall mean all charges and bills presented for payment to a Merchant for transportation services arising out of the transportation of goods by a carrier whether said transportation was by rail, water, motor vehicle or airplane (b) "Carrier" shall include any freight carrier, common carrier or freight forwarder engaged in interstate, intrastate, or international transportation of goods. (c) "Overcharge" shall mean charges for transportation services in excess of those applicable thereto under lawfully filed tariffs. (d) "Duplicate payment" shall mean all or any portion of a payment made by Merchant to M.S.C.C. on any freight bill on which the freight charges due have previously been paid in full. (e) "Discount" shall be deemed to mean that credit allowed to Merchant for prompt payment to M.S.C.C. of freight bills, as provided in paragraph two (2) on the reversa side hereof, which credit shall be given to Merchant in the form of a refund as herein providad.

Agency. Merchant hareby appoints M.S.C.C. as its sole agent to perform and do all things necessary to adjust, audit and pay all freight bills forwarded to M.S.C.C. as fully and to all intents and purposes as Merchant might or could do on its own behalf. Merchant irravocably assigns, transfers and sets over to M.S.C.C. all rights it may have against any carrier on account of any overcharge made by carrier on those freight bills which are forwarded to M.S.C.C. under the terms of this agreement. Merchant further grants M.S.C.C. full power of attorney to represent Merchant at all hearings and before all courts, boards or commissions having authority to act or consider any charges or overcharges on said freight bills.

Insurance. M.S.C.C. agrees to maintain adequate bonds and insurance to protect Merchant against any loss of freight bills by fire, theft or from any liability which Merchant may incur as a result of errors or omissions arising from M.S.C.C.'s audit and/or payment of freight bills.

Rate Changes. In the event any tariff rates are raised or lowered and in the event any said changas are retroactive with the effect of changing the amount of freight charges on fraight bills which are the subject of this agreement, then M.S.C.C. shall, in those cases in which the amount of freight charges are decreased, make claim against the carrier and shall pay to Merchant one-half (1/2) of any monies recovered from carrier. In those cases in which the amount of freight charges are increased, then Merchant shall pay to M.S.C.C. for payment to carrier such additional amounts as may be due and shall hold M.S.C.C. harmless from any claim for said monies by carrier against M.S.C.C. This provision shall specifically continue in force after termination of this agreement.

Additional Audit. All monies received as a result of any M.S.C.C. audit on any freight bill performed six full months or more after the initial audit shall be divided equally between Merchant and M.S.C.C. This provision shall specifically remain in force after termination of this agreement.

Term and Benefit. This contract shall be binding upon and inure to the benefit of the successors, legal representatives, and assigns of M.S.C.C. and Merchant. Nevertheless, the contract may be cancelled by either party upon giving thirty (30) days' written notice of cancellation to the other. At the end of said thirty-day period this agreement shall terminate, except that all monies on hand shall be distributed by M.S.C.C. in accordance with the terms of this contract. At termination, M.S.C.C. may withdraw from any proceedings before courts, boards and commissions affecting Merchant's freight charges.

MILLERS' NATIONAL FEDERATION,
Washington, D.C., September 25, 1970.

HON. SAMUEL N. FRIEDEL,
Member of Congress, U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN FRIEDEL: The Millers' National Federation wishes to express its wholehearted support for your bill H.R. 9681 and identical bills to be considered this week by your Subcommittee. We do believe, however, that it would be desirable to amend H.R. 9681 so as to make it consistent with S. 1653 as passed by the Senate.

The members of the Federation produce about 85 percent of all wheat flour milled in the United States and, as a result, are the receivers of some 550 million bushels of wheat annually and the shippers of 2.5 billion pounds of flour, in addition to other food products.

The experience of the milling industry is much the same as that of many others, especially shippers of relatively high-volume, low-value products. The frequency of milling industry claims is quite high and, although most individual claims are not large, the accumulated total is of major economic significance. Unfortunately, valid claims against carriers do sometimes go unpaid, perhaps with the knowledge that shippers cannot justify the cost of legal actions on such claims.

For most shippers, the railroads frequently provide the only feasible mode of carriage and in many instances only one railroad is available to shippers. Thus, shippers have no competitive alternative to turn to in the face of poor service or an inequitable claims policy. We believe that H.R. 9681 will give shippers a small measure of economic bargaining power in dealing with claims against carriers with whom they must do business.

We earnestly urge the Subcommittee's speedy approval of H.R. 9681 and we would have no objection to its adoption in the form as passed by the Senate in S. 1653. We would also appreciate having this letter included in the record of your hearings.

Sincerely yours,

J. LAWSON COOK,
Chairman, Transportation Policy Committee.

NATIONAL GRAIN TRADE COUNCIL,
Washington, D.C., September 30, 1970.

HON. SAMUEL N. FRIEDEL,
Subcommittee on Transportation and Aeronautics,
House Committee on Interstate and Foreign Commerce,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: The National Grain Trade Council favors the approval by your Subcommittee and the enactment by Congress of S. 1653 and requests that our views in favor of S. 1653 be incorporated in the record of hearings of your Subcommittee.

The grain marketing industry continues to meet resistance from rail carriers as individuals, firms and corporations in the grain industry attempt to assert what, in their opinion, are valid and justifiable claims for losses to grain during interstate rail shipment. Railroad resistance to recognize the validity of claims stems from the adoption by the railroads of arbitrary and capricious claims policies, and by the railroads' failure to acknowledge claims after persons in the industry have documented the validity of the claims which they are asserting.

These claims, varying in size and value, can be proved, but under the present state of the law, only at an expense, sometimes substantial, to grain industry claimants. To minimize this expense, the pending legislation would permit the courts to allow a reasonable attorney's fee to successful claimants, who have been required by the railroads to assert and prove the validity of their claims in court actions.

This, in our judgment, is a sensible result. If enacted, the railroads will be discouraged from resisting more modest claims and may well be encouraged to look with a more objective eye on all claims. Under the proposal, if the court finds against one who is asserting a claim, his expense for legal services remains with him. Only if a court finds that the railroads have improperly evaluated claims will the burden of these fees fall to them.

At the moment there is pending in the Interstate Commerce Commission a proceeding designated Ex Parte 263 which is aimed at investigating the claims practices of common carriers, including railroads. September 30 is the last day on which interested parties may file initial statements. Nearly 400 individuals, companies or organizations are taking part in the proceeding and already statements filed to date with the Commission indicate substantial shipper dissatisfaction with what we described in the second paragraph of this letter as the railroads' arbitrary and capricious claims policies. Enactment of S. 1653 would in our judgment tend to prompt a railroad industry attitude more consistent with rail carriers' obligations as common carriers.

Very truly yours,

WILLIAM F. BROOKS, *President.*

NATIONAL RETAIL FURNITURE ASSOCIATION
Chicago, Ill., October 5, 1970.

HON. SAMUEL N. FRIEDEL,
Chairman, Subcommittee on Transportation and Aeronautics,
Interstate and Foreign Commerce Committee,
U.S. House of Representatives, Washington, D.C.

DEAR MR. FRIEDEL: The National Home Furnishings Association (formerly National Retail Furniture Association) is interested in securing, for the nation's shippers, freight service that is as dependable and damage-free as possible. As spokesman for more than 9,000 home furnishings retailers throughout the country, the Association supports the Attorney's Fee Bill, not only because it will encourage more prompt and equitable payment of claims, but because it will help to bring about improved freight service.

The home furnishings retailer is in a unique situation. Today's home furnishings customer has grown accustomed to selecting furniture that will precisely fit her own individual tastes, rather than simply choosing from a limited selection on display. A typical customer might, for instance, select a chair style she sees in the store, but ask that it be covered in one of many other upholstery fabrics available to her. The retailer then orders a chair tailored to her specifications—a process that normally takes from four to six weeks.

If, at the end of that period, the chair is damaged during shipment and arrives is unsaleable condition, the retailer not only runs the risk of losing the sale but of damaging a valuable customer relationship as well. The normal reaction of any customer would be disappointment and irritation. So the home furnishings retailer, who depends on his customers' continued good will, has a special interest in seeing the merchandise delivered not only on time but in good condition.

Securing damage-free service has become increasingly difficult in recent years, however—not only in selected areas of the country but nationwide. Securing fair compensation for damages is, likewise, a growing problem. Even if merchandise is *obviously* damaged when the carrier delivers it to the retailer, obtaining payment of a claim often becomes a long and unnecessarily painful process. Even when claims for obvious damage are successful, it is not at all unusual for the process to take six to nine months of constant and repeated follow-up on the part of the retailer.

This problem has been heightened in the past year by new damage claim settlement rules adopted by the nation's railroads, trucking companies and freight forwarders. According to the new rules, the carriers often pay only one-third or one-half of the value of concealed damage claims.

Although these rules are not sanctioned by law, the carriers are able to perpetuate them because, in many cases, the retailer cannot afford to take a contested claim to court. The cost of hiring an attorney to handle and present the case often exceeds the amount of damages the retailer would recover if the case succeeds.

Some carriers undoubtedly rely on the fact that a claimant would lose money by taking a justified claim to court. This is especially true of claims for less than $100—although by no means limited only to these smaller amounts. Carriers also rely upon the fact that many retailers, especially smaller ones, do not retain attorneys on a permanent basis and, therefore, are not familiar with how to press a claim in court.

So, backed up by this knowledge, a carrier has little reason to work diligently at keeping damages to the lowest minimum possible. The law says he must be paid for his services—regardless of how well or how poorly he has performed them—while, at the same time, he can arbitrarily engage in the practice of paying

only a portion of claims. He has little fear of being legally taken to task for it by the injured retailer.

The Attorney's Fee Bill would help rectify this situation. The retailer would be better able to pursue a claim in court when it can be established that the carrier is at fault for damages. If a carrier knows there is a greater chance of being taken to court for recovery of damages that can be traced to his handling of a shipment, it is only logical that he would make a greater effort to guard against damage whenever possible and to pay justified claims when they are submitted.

We urge this subcommittee to approve the Attorney's Fee Bill so that it can be enacted before adjournment of this session of Congress. Already it has received wide support as a valuable tool for reducing the freight damage problem.

As you know, in January of this year the Senate passed S. 1653 without opposition. Both the Administration and the Interstate Commerce Commission have expressed support of the concept. The nation's shippers and receivers are also behind the Attorney's Fee Bill. Only the carriers are opposed.

Although we would favor the Friedel bill (H.R. 9681), the Association would be willing to accept the Senate-passed version or its counterpart, the Jarman bill (H.R. 17367). All of them contain the important Attorney's Fee concept that would make it economically practical for a retailer to pursue claims in court and encourage carriers to work at eliminating unnecessary, avoidable damage.

In sum, NHFA wants freight service that is as dependable and damage-free as possible. When damage does occur, we want damage claims to be handled fairly and promptly. But retailers do not get fair and prompt damage claim consideration; in fact, the claim situation is getting steadily worse. That is why we support the Attorney's Fee Bill. Our members would much rather handle claims out of court, but in view of the current carrier attitudes, they have a choice of either going to court or facing continually mounting losses.

On behalf of home furnishings retailers throughout the country, we respectfully request that your subcommittee carefully consider our recommendations and ask that this letter be included in the printed record of hearings on the Attorney's Fee Bill.

Sincerely,

JAMES REIFERS,
Chairman, Freight and Traffic Committee.

VEGETABLE GROWERS ASSOCIATION OF AMERICA
Washington, D.C., September 24, 1970.

Hon. HARLEY O. STAGGERS,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN STAGGERS: On behalf of the Vegetable Growers Association of America we fully support and are in complete agreement with the testimony of Mr. Durward Seals, Traffic Manager of the United Fresh Fruit and Vegetable Association.

Our organization is comprised of 1040 small vegetable growers including 40 affiliate associations. As small growers we want to see a dependable flow of vegetables to market. The unreliability of deliveries is causing a good deal of hardship to wholesalers and retailers as they must necessarily depend upon timely deliveries in order to advertise their products through the press and other media in order to keep the consumer informed as to what is available.

Our position was affirmed at our Annual Meeting in February 1970 as outlined above.

It would be appreciated if you would include this testimony in the record of the hearing proceedings.

Thanking you for your courtesy in this connection, I am,

Respectfully yours,

A. E. MERCKER,
Executive Secretary.

(Whereupon, at 5:30 p.m., the subcommittee was adjourned, to reconvene subject to the call of the chair.)

(Further hearings were tentatively set for later in the session but because of other legislative demands time did not permit.)

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